



# HISTORY OF LAW AND OTHER HUMANITIES

Edited by  
VIRGINIA AMOROSI  
and  
VALERIO MASSIMO MINALE



## HISTORY OF LAW AND OTHER HUMANITIES

The Figuerola Institute  
Programme: Legal History

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HISTORY OF LAW AND OTHER HUMANITIES:  
VIEWS OF THE LEGAL WORLD ACROSS THE TIME

*Edited by*  
Virginia Amorosi  
*and*  
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## INDEX

Preface	13
<i>New Perspectives on 'Law and Humanities' together with a 'Musical' Approach to the History of Legal Problems: Looking Through the Mirror of Opera</i> Valerio Massimo Minale	15
<i>(History of) Law and Other Humanities: When, Why, How</i> Luigi Lacchè	25
Chapter I Iconography of Law	
<i>A Legal Study of Medieval Cities from the 11th to 14th Century: The Example of Sigillography in France</i> Romain Broussais	47
<i>Typographic Art and Roman Law: A Renaissance Image of the Lex XII tabularum</i> Fabiana Tuccillo	69
Chapter II Representation of Justice in Music Culture	
<i>«Oh, the Law is Ruination, and Attorneys are Vexation ...» Law and Lawyers in the Opera and Operetta</i> Krzysztof Bokwa	83

## INDEX

<i>The Boyars, the Poet and the Composer. The Portrayal of the Boyar Duma in Puškin's and Mussorgsky's Boris Godunov</i> Nina Kršljanin, Filip Milinković	97
<i>The Dreyfus Affair in Music.</i> L'Hymne à la Justice of Albéric Magnard Mario Riberi	123
Chapter III	
Architecture and Politics of Justice	
<i>Scientia iuris and architectura. A Focus on Buildings for Shows</i> Paola Pasquino	141
<i>Optimus princeps and the Triumphal Arch in Benevento</i> Alessio Guasco	157
<i>Law, Justice and Architecture in Modern Venice: The Rectors' Palaces and the Government of the Mainland</i> Claudia Passarella	167
<i>Milan's Courthouse: A View of the Roman Legal Culture across Fascist Ideology</i> Virginia Maria De Capitani	181
Chapter IV	
Philosophy, Methodology and the Construction of the Law	
<i>Cicero's Thinking on the Essence of Legal Reasoning</i> Valentina Cvetković-Dordević	195
<i>Interpreting the Antiheretical Edict of Wieluń. Between Literal Meaning and Philosophical Approach</i> Paweł Dziwiński	205
<i>Law and Humanities in Giambattista Vico's Thought. A First Understanding</i> Alessia Farano	221



<i>The National Codification of Civil Law in Poland at the Beginning of the 19th Century. Sources and Inspirations</i> Piotr Pomianowski	235
Chapter V	
Legal Culture in Poetry, Drama and Novel	
<i>The Frogs by Aristophanes: When Comedy Meets Legal History</i> Athanasios Delios	249
<i>Medicus between Perception and Reality as Portrayed in Some Non-legal Sources</i> Nikol Žiha	265
<i>Military Law, Justice and Discipline in the Early Modern Owlglass Literature from Central Europe</i> Przemysław Gawron, Jan Jerzy Sowa	287
<i>Pamphlet Literature Reflecting Parliamentary Opposition at the Time of the French Fronde: The Example of the Mazarinades (1648-1649)</i> Juan Manuel Hernández Vélez	299
<i>The Methods for the Legitimation of the Succession of James II in Aphra Behn's Poem for Coronation</i> Balázs Rigó	315
<i>Balzac and the Criticisms of the French Civil Code in the First Half of the 19th Century</i> Elisabeth Bruyère	329
Chapter VI	
Literary Environments for Criminal Law	
<i>The Medieval Legal Practice of Exculpatory Oath and Trial by Fire in the Legend of Queen Isolde</i> Alicja Bańczyk	339

## INDEX

<i>Between Law and Literature.</i> <i>Violations of the Legal Rule in the Decameron</i> Daniela Buccomino	349
<i>Institutions and Criminal Procedure of the Magdeburg Law in Poland according to Judas' Sack by Sebastian Fabian Klonowic</i> Lukasz Golaszewski	377
<i>A Letter from Detention: The Edition of Letters of Livonian Humanistic Lawyer David Hilchen as an Interdisciplinary Challenge</i> Hesi Siimets-Gross	391
<i>The Case of Eszter Solymosi from Tiszaeszlár: The Notorious Blood Libel Trial through the Eyes of Gyula Krúdy</i> Imre Kepessy	407
<i>Reading a Travel Journal.</i> <i>The Melancholia of Gina Lombroso in Latin America</i> Francesco Rotondo	419
Chapter VII Stories of Law and Cinema	
<i>History of Rome, History of Roman Law and Cinema</i> Carlo De Cristofaro	433
<i>You Can Only Write Once – Rights to Authorship, Inspiration and Transformation in the Chosen Judgements of U.S. Courts Involving the Copyrights on the James Bond Character</i> Wojciech Bańczyk	443
Chapter VIII Popular Culture and Legal Culture in Contemporary Age	
<i>Advertising and the Rule of Law. Law in Representations of Insurance in Late 19th Century Netherlands</i> Christina Reimann	457

<i>Newspapers and the Making of Popular Legal Culture. The Example of the Death Penalty in France (20th century)</i> Nicolas Picard	471
<i>Secularism versus Religion-based Legal Pluralism: The Diverse Views on These Concepts in Modern Muslim Discourse and Culture between 19th and 21st Century</i> Rafal Kaczmarczyk	483
Chapter IX Law and Political Practice	
<i>Legal Organization of Medieval Serbian Mining Communities</i> Andreja Katančević	497
<i>The Structure of the Government and the Press</i> Gábor Bathó	513
<i>The Influence of Political Factors on the Adjudicating on Petty Offences in the People's Republic of Poland</i> Marcin Lysko	527
Chapter X History of Law, History and Law: Perspectives for Methodology and Teaching	
<i>History and Legal History in Latin America. Reflections on a Necessary Dialogue with Special Attention to Cuban Experience</i> Fabricio Mulet Martínez	539
<i>Teaching a Historical Context in a First-Year 'Introduction to Private Law' Course. The Effects of Teaching Approaches and a Learning Environment on Students' Learning</i> Emanuel G. D. van Dongen, Irma Meijerman	551
Abstracts	571



## PREFACE

The collection of essays presented here examines the links forged through the ages between the realm of law and the expressions of the humanistic culture.

We collected thirty-five essays by international scholars and organized them into sections of ten chapters based around ten different themes. Two main perspectives emerged: in some articles the topic relates to the conventional approach of law and/in humanities (iconography, literature, architecture, cinema, music), other articles are about more traditional connections between fields of knowledge (in particular, philosophy, political experiences, didactics).

We decided not to confine authors to one particular methodological framework, preferring instead to promote historiographical openness. Our intention was to create a patchwork of different approaches, with each article drawing on a different area of culture to provide a new angle to the history being told. The variety of authorial nationalities gives the collection a multicultural character and the breadth of the chronological period it deals with – from antiquity to the contemporary age – adds further depth of insight.

As the element that unites the collection is historiographical interpretation, we wanted to bring to the fore its historical depth. Thus for every chapter we organized the articles in chronological order according to the historical context covered.

Looking at the final outcome, it was interesting to learn that more often than not the connection between law and humanities is not simply a relation between a specific branch of the law and a single field of the humanities, but rather a relation that could be developed in many directions at once, involving different fields of knowledge, and of arts and popular culture.

We are grateful to Luigi Lacchè for his contribution to this collection. His essay outlines the coordinates of the ‘law and humanities’ world, laying out the instruments necessary for an understanding of the origins of a complex methodology and the different approaches that exist within it.

This project is the result of discussions that took place during the XXIII Forum of the Association of Young Legal Historians held in Naples in the spring of 2017. The book was made possible thanks to the advice and support of Cristina Vano.

The Editors



NEW PERSPECTIVES ON 'LAW AND HUMANITIES'  
TOGETHER WITH A 'MUSICAL' APPROACH TO THE HISTORY  
OF LEGAL PROBLEMS: LOOKING THROUGH THE MIRROR OF OPERA

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The title of the present book, *History of Law and Other Humanities: Views of the Legal World across the Time*, has been chosen to try to offer a short contribute, but able to be inserted in the great debate on 'Law and Humanities', polysemous term indicating the matter which since decades has collected quite innumerable publications<sup>1</sup> and even important reviews<sup>2</sup>; in Italy, in particular, we have several university courses<sup>3</sup>, apart from some series of monographs<sup>4</sup>.

The topic, however, has the ambition to go beyond the American tradition of 'Law and Literature' (both *Law in Literature* and *Law as Literature*), initially launched by Benjamin Nathan Cardozo<sup>5</sup> and by now risen as a true academic subject<sup>6</sup>, arriving to include all the arts and more in general every

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1 See SERAT, ANDERSON, FRANK (2010), pp. 1-46.

2 In particular, *Yale Journal of Law and Humanities* (New Haven, Conn., 1988) and *Law and Humanities* (Oxford, 2007); moreover, *Law, Culture and the Humanities* which since 2005 is the publication of the Association for the Study of Law, Culture and the Humanities.

3 At the Università degli Studi di Roma Tre (<https://lawandhumanitiesrome.org/>), but also the Università degli Studi dell'Insubria and the Università degli Studi di Torino.

4 We would like to quote *Law and Humanities* dir. by Vittorio Capuzza (Aracne, Roma, 2011) together with *Imago Iuris* dir. by Luigi Garofalo (Pacini, Pisa, 2017) and *Ius in fabula* dir. by Giovanni Rossi (Napoli, ESI, 2017).

5 About the legal thought of the great American jurist and his work – *The Nature of Judicial Process* (1921), *The Growth of the Law* (1924) and *The Paradox of Legal Science* (1928); moreover, *Law and Literature and Other Essays and Addresses*, Littleton (Col.) 1986, where "Law and Literature", originally in *Yale Review* 14 (1924-1925) 699-718, together with *Il giudice e il diritto*, Firenze 1961 (rec. E. BETTI, in *SDHI*. 28, 1962, 425-428) and P. G. MONATERI, U. MATTEI (eds.), *Lectures in Law*, Padova 1991 – see at any rate HELLMAN (1969), POLENBERG (1997) and KAUFMAN (1998); among the others, see also FARALLI (2012); finally, we refer to *Cardozo Studies in Law and Literature* (1989-2001: Cardozo School of Law).

6 For the Italian scenario, apart from the ventures proposed by the Italian Society of Law and Literature (Società Italiana di Diritto e Letteratura), see recently ROSSI (2017); moreover, SANSONE (2001) and MITTICA (2009) and again MITTICA (2015); finally, TORRE (2015).

not scientific aspect of knowledge<sup>7</sup>.

Sure enough it is known how much law has always inspired other fields, especially concerning arts: actually, it is realistic to state that the effects produced by the rules operate just outside their structure, through the vision elaborated by every society in different times and spaces.

In this sense arts together with each manifestation of cultural life have often represented and continue to represent a meaningful opportunity to reflect on a specific legal system and its coeval mentality: beside literature, all the figurative expressions, but also architecture, music and cinema, only to quote few cases, have approached the problem of law and justice in many modes.

Anyway, if we take for granted that humanities are considered an authentic mine of information for history of law – the study of the antiquity, in particular, uses non-legal sources as an unavoidable instrument of research – nevertheless a certain contemporary historiography, mainly originating from the American law faculties, has been stressing the importance for scholars to analyse legal texts as literature or sometime artistic works and in turn many products of humanities as legal texts.

According to these two main streams, it is possible to construct history or better some stories of law following different directions: we could observe that through the centuries the juridical dimension has been recounted through literary pages, images, buildings, theatrical works and musical compositions, and movies; moreover, that law itself could be read as a narration of the reality like a novel, a painting or a symphony, because a legal text is also mirror of the society which has made it.

So this kind of relation between law and humanities has a bidirectional feature and puts the legal discourse in a continuous circuit of interpretation and representation.

Among all these elements, probably the connection between law and music (especially the classical one together with opera too, both taken in consideration in a section of our volume) could embody a very useful observation point, because of the strong hermeneutic significance.

This other kind of relation stay in the structure of the interpretation<sup>8</sup> –

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7 See WHITE (1973); for a hard critical position, POSNER (1986) and again POSNER (2009); rather favourable to this kind of approach is NUSSBAUM (1996).

8 See RUFFIER-MERAY (2007a) together with RUFFIER-MERAY (2007b), COMBACAU (2005), IUDICA (2004) and less recently SCHWALM (1977); moreover, KORNSTEIN (1982), but also HALL



if we consider the legal text as a score, according with the teaching full of freedom of Jerome N. Frank<sup>9</sup> and then following by an illustrious tradition, also Italian<sup>10</sup> – as well in being one of the best expressions of a society (but also considering that sometimes music could be an order as in the context of military life or during the struggle of a battle and something more as in the specific case of the national anthems); something different is to consider the law as a music, following an aesthetic theory of legal sources<sup>11</sup>.

The first point is embodied by the problem of the interpretation because we know that the law or better any legal text in order to be implemented in the real world must pass through a human filter, often the judge who decides a case and issues a sentence: in the same way music (and drama too) is a ‘performative activity’<sup>12</sup>, that is to say that to be enjoyed by the public – which not necessarily has to be capable to read a score and its system of «notazione musicale»<sup>13</sup> or

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(1999); finally, again especially for the Italian reader, BRUNELLO, ZAGREBELSKY (2016), reviewed by MAZZUCCA (2017).

9 It is known how “Say It with Music”, *Harvard Law Review* 61 (1948), pp. 921 ss. and “Words and Music: Some Remarks on Statutory Interpretation”, *Columbia Law Review* 47 (1947), pp. 1259 ss. proposed the new view of a «musical metaphor». About these arguments, see NITRATO IZZO (2007), NITRATO IZZO (2010), NITRATO IZZO (2011) and NITRATO IZZO (2017); moreover, ROULAND (2001), GROSSFELD, HILLER (2008) and above all RESTA (2011); finally, COSSUTTA (2011), but also BUONO (2018).

10 Starting from a famous article – GATTI (1930) – concerning the nature of the interpreter as something like a creator or a simple executor, the influence of the philosophy on aesthetic of Benedetto CROCE (1913, pp. 67 ss. and other places; STELLA, 2002) led especially Alfredo PARENTE to choose the second possibility (1930 and 1936, *passim*; moreover, MILA, 1972; finally, DONISI, 2017), forcing the Italian musical critics on positions more artistic than technical (VISENTINI, 1982, and SANSONE, 2012; moreover, CANDELA, 2005; against this idealistic approach PARIGI, 1917, and the review *La critica musicale* from 1918 to 1923), while a less drastic one was followed by Edmondo CIONE (1938) and mainly by Salvatore PUGLIATTI, jurist and musicologist (1940; moreover, FUBINI, 1999, and SGRO, 2001, together with FERLAZZO NATOLI, 2018, pp. 99-103); Emilio BETTI, from a different point of view, put the executor as a *medium* between the work and the public by developing the concepts of «funzione riproduttiva» and «funzione normativa» in addition to that one of «funzione cognitiva» (1948, 1949 and mainly 1955; moreover, KORZENIOWSKI (2010).

11 See MANDERSON (2000) and MANDERSON (2010); moreover, DOUZINAS (2007) together with DOUZINAS (1999).

12 In particular, BALKIN, LEVINSON (1991); moreover, MERISI (2011) and MERISI (2012).

13 On the “grafemi”, which move the attention from the relation text-interpreter or executor to that one author-text, see G. GRAZIOSI, *L'interpretazione musicale*, Torino 1952.

to play an instrument<sup>14</sup> – needs to be just performed because the fruition of this typology of art is not immediate, but entails the role of an interpreter, who could be a musician or a director of orchestra; rises up from here the question about the research of ‘authenticity’ of the musical work<sup>15</sup>, more usefully if into a historical perspective<sup>16</sup>.

The second one, on the other side, is related with the legal culture eventually reflected in classical music, especially opera, which since its birth has offered the possibility to represent in many ways the complex world of law.

Exactly opera, which joins music to lyric and theatre, is probably a perfect place where to search the sense of a whole culture<sup>17</sup>; actually, it appears as a mirror where to observe legal problems, often concerning private law<sup>18</sup>, as well political ideologies<sup>19</sup>: it is clear that both the elements are strictly connected with the *libretto*, so with its literary aspect, even if music, thanks of course to instruments and voices, could represent also a form of ideological and political choice.

The world of opera itself – since its birth in Florence and Mantua during the Italian Late Renaissance through the transference in music of the myth of Orpheus<sup>20</sup>, where the legal theme is represented by the struggle between the rules of the humans and those ones of the gods – has been a place, because of a hybrid nature which puts in dialogue multiple forms of art, not only music and poetry, but also visual experiences as scenography and choreography, where it is frequent to find juridical aspects of that contemporary society or

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14 This aspect is strictly connected with the industry of the production and commercialization of music and video registrations on various material supports, the discographical one, which has interrupted the direct relation with the musical text, the score: above all, BENJAMIN (2000), but also ATTALI (1978).

15 See TARUSKIN (1995) and GOEHR (1992).

16 Again RESTA (2011), pp. 444 ss. together with DAHLHAUS (1977).

17 See TOUZEL-DIVINA, KOUBI (2008), ŁĘTOWSKA, PAWŁOWSKI (2014) and ANNUNZIATA, COLOMBO (2018a) (where in particular again ANNUNZIATA, COLOMBO, 2018b); recently a congress was organized in Rome on the 28<sup>th</sup> of November, 2018, at Palazzo Spada, which is the seat of the *Consiglio di Stato* of Italy: *Il diritto della musica e la musica nel diritto* (Law of Music and Music in Law).

18 For example, ANNUNZIATA (2016); moreover, BRUGUIERE (2001), where in particular PUTMAN (2001), but also RACHENBERG (1974); finally, on a specific case, COLOMBO (2015).

19 See ROBINSON (1986); ARBLASTER (1992); BOKINA (2009).

20 Jacopo Peri's and Giulio Caccini's *Euridice*, on Ottavio Rinuccini's *libretto*, both of 1600 (Florence), together with Claudio Monteverdi's *Orfeo*, on Alessandro Striggio's *libretto*, of 1607 (Mantua); see PIRROTTA (1969).

their idea belonging to another one, maybe far away in time and space; these aspects, superficial or pervasive, show themselves as deeply revealing to the eyes of a legal historian.

On consequence, even if classical music and above all opera must be evaluated only as examples of humanities expressing a legal and juridical culture, we could confer them a favoured status in considering the large concept of 'Law and Humanities'.

Such a key of lecture will be useful to introduce the volume, which pretends to mean in the future of the Association of Young Legal Historians<sup>21</sup> a pivotal point: a collection of different works, but looking in the same direction, that one to offer to the scientific debate more and maybe better instruments in order to interpret and try to understand, as historians, the reality of law and justice.

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<sup>21</sup> The group was officially founded in Seville in 2007, but it has been active as community of scholars at the beginning of their career already since the 90' among the *Max-Planck für europäische Rechtsgeschichte* in Frankfurt am Main: especially, TUORI (2006).

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## (HISTORY OF) LAW AND OTHER HUMANITIES: WHEN, WHY, HOW\*

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### 1. *When?*

It is not difficult to see that the topic is highly intriguing... but indeed complex, sounding perhaps a little ‘dangerous’ too. Someone might ask: why does law need ‘other humanities’? Law is a self-sufficient world, ancient and technically autonomous. Legal science in Italy is even divided into twenty-one different ‘sectors’... So, what else does it need?

In my talk I will deal with our theme from the point of view of a jurist who has chosen to consider legal phenomena through legal history. Legal historians are normally, I would say, in a difficult position<sup>2</sup>. They are seen as in-between scholars: on the one hand, according to ‘positive jurists’, they are first and foremost historians; on the other – from the perspective of ‘general historians’ – they are above all ‘jurists’. Theirs is a ‘hybrid epistemological status’. This same status can be considered a weakness but conversely I believe that it can become a tenet of complexity and cultural richness. Legal historians can highlight both the ineluctable historicity of the law and, at the same time, the need to deal with the latter in its very specialized dimension.

My sole purpose today is to reflect briefly on some features and potentialities of Legal history by comparison with so-called *Law and Humanities Studies*<sup>3</sup>. As is well known, the original ‘matrix’ is that of *Law and Literature*. Over the course of a century this approach has become a very broad, polyphonic, heterogeneous and also controversial topic.

When did this approach take its first tentative steps? It used to be claimed that *Law and Humanities* is a very ancient topic. Legal experts – starting

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\* I publish here my keynote speech opening the XXIIIrd Annual Forum of the Association of Young Legal Historians on “History of Law and Other Humanities: Views of the Legal World Across the Time”, 30 May 2017. I prefer to maintain the oral essence of my talk, dedicating it to the memory of Prof. Aldo Mazzacane.

1 For some critical remarks see CONTE (2018), pp. 118 ss.

2 For an interesting overview see SORDI (2013).

3 For a first framing, see SARAT, ANDERSON, FRANK (2010).

from the Roman period<sup>4</sup> - have always been humanists; in some periods this link was crucial. This is true but I refer here to the contemporary methodological approach developed from the beginning of the twentieth century.

As a matter of fact, the 'classical' point of reference is the American debate of the early 20<sup>th</sup> century. Every tradition worthy of respect boasts some 'heralds' or precursors. In this case we must cite John Henry Wigmore (1863-1943), who published in 1908 *A List of Legal Novels*<sup>5</sup>. The author of the fundamental *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*<sup>6</sup> thought that «literature can provide a “gallery of life's portraits”, a “storehouse” of knowledge from which lawyers could draw in their work»<sup>7</sup>. Literature can give lawyers a sense of the complex nature of the human condition. The jurist - Wigmore said - has «a general duty» to be «a cultivated man» developing a literary sensibility. In 1922 Wigmore published a more wide-ranging version of his original article: *A List of One Hundred Legal Novels*<sup>8</sup> «in which he lists and classifies books in terms of their concern with the law»<sup>9</sup>.

In 1925 judge Nathan Benjamin Cardozo (1870-1938), already author of the famous *The Nature of Judicial Process* (1921) and who would in 1932 succeed judge Oliver Wendell Holmes Jr. at the Supreme Court, entitled «Law and Literature» an article in which he considered the literary qualities of law, looking especially to judgements as examples of literary style, pointing out that «Form is not something added to substance as a mere protuberant adornment. The two are fused into a unity»<sup>10</sup>.

With Wigmore and Cardozo therefore, in the context of legal realism and sociological jurisprudence, the first examples of *Law in Literature* and *Law as Literature* approaches<sup>11</sup> took their first steps. Likewise in Europe, between

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4 See now MANTOVANI (2018).

5 See the Bibliography.

6 See the Bibliography.

7 ARISTODEMOU (1993), p. 165.

8 «A 'legal' novel, as here meant, will be simply a novel in which a lawyer, most of all, ought to be interested, because the principles or the profession of the law form main part of the author's theme», in *Illinois Law Review*, 17, 1922-1923, p. 26.

9 ROALFE (1962), p. 299.

10 CARDOZO (1925), p. 700. On this point see WEISBERG (2014), § 1.

11 Cf. MICHAUT (2014). «These contributions can be categorized into two strands, one dealing with law *in literature*, the second dealing with law *as literature*. These two approaches correspond to the two elements that law and literature have in common and which

the 1920s and the 1930s authors as Ferruccio Pergolesi, Antonio D'Amato or Hans Fehr developed on their own account this kind of study<sup>12</sup>.

From the 1970s onwards the Law and Literature Movement has experienced, in America, a robust revival, introducing new issues and fresh perspectives. The descriptive distinction between *Law in Literature* and *Law as Literature* acquired further meanings. It «essentially advocates the application of techniques more familiar in the fields of literary theory and criticism to the exercise of legal textual interpretation. In other words it makes the claim that all legal texts are pieces of literature and must be understood and used as such. Law in literature correspondingly advocates the use of literary texts and narrative fiction as a supplement to the more obviously 'legal' texts, to better facilitate jurisprudential discourse and understanding»<sup>13</sup>. Some of the protagonists were James Boyd White, Richard Weisberg, Ian Ward, Paul J. Heald, Martha Nussbaum, Richard Rorty, Owen Fiss, Thomas Brook, Stanley Fish, Sanford Levinson, Robin West and many others. This development is impressive. At the beginning of the 21<sup>st</sup> century more than one hundred and twenty teachers in law and literature can be found in the American Universities. Many Conferences, publications, networks, Societies, Journals (such as *Law and literature* or *Law and humanities*), and websites mirror this trend. Just a glance at «Law and Humanities blog» is sufficient to gain an overview of the extent and richness of this movement<sup>14</sup>.

With all due sense of proportion, we can recall also a significant growth of this approach in Italy, involving scholars concerned with on Humanities and Legal Studies, Societies, teaching and legal education, Conferences, Journals<sup>15</sup>. We have then to stress that the study of Law and the Humanities became an ever broader area, comprising not only the original *Law and Literature*, but also *Law and Cinema*, *Law and Art*, *Law and Music*<sup>16</sup>...

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first inspired the suggestion that mutual benefits may be derived from a common study»: ARISTODEMOU (1993), p. 189.

12 For the historical evolution of «Law and Literature» approaches I refer back to the broad surveys of SANSONE (2001); MITTICA (2009); EAD. (2010); EAD. (2014).

13 WARD (1994), pp. 389-390.

14 Some remarks in POSNER (2009<sup>3</sup>).

15 See above nt. 12.

16 DI ROBILANT (2001); SOMMA (2003); VITIELLO (2013); MAGANZANI (2016).

## 2. *Why?*

Our question today should be first and foremost «why?». Sometimes we chance to hear (I refer to Italy) that the claim for *Law and Humanities* is a ‘trend’ *à la mode* and as such destined to pass. But on the one hand, we ought not to underestimate certain pedagogical implications. «This is not to say that literature competes with or is a substitute for philosophical, historical, social or legal knowledge; simply that it may complement the latter by making then more interesting, less abstract, and generally more fun»<sup>17</sup>. On the other hand, amateurishness can weaken such approaches. These criticisms however cannot explain altogether the extent and complexity of this method. There is something deeper at stake. So, the question «why?» retains all its meaning.

It is impossible to provide an in-depth response in the course of a few pages. I can only try to offer some remarks that I consider to be particularly relevant to legal history.

First of all, we have to see *Law and Humanities* within the context of «Post-modern Legal Movements». This is a very broad (indeed, perhaps a too broad) category containing a number of different major currents (Law and Economics, Critical Legal Studies, Feminist law theory, Racial diversity Theory, Law and Literature)<sup>18</sup>. If legal postmodernity is seen as an «age of unbelief», the idea of believing in the existence of realities or legal facts, genuinely or objectively described by doctrine and jurisprudence, would seem to have been lost. Deconstructionism has acquired considerable influence<sup>19</sup> through its revealing of gaps, voids, fractures, discontinuities, aporias, ideological structures in legal studies, too. Law has thus been seen as a ‘narrative’, with the study of literature seeming to resemble in some respects the activity of juridical interpretation<sup>20</sup>. *Law and Literature* share hermeneutics; both depend on language. Law is a ‘narrative’ that serves to interpret and translate, much as other narratives do. If law is a technique of constructing the world then law has to be seen as able to «narrate» the world<sup>21</sup>. According to Robert Cover «We inhabit

<sup>17</sup> ARISTODEMOU (1993), pp. 172-173.

<sup>18</sup> According to the classification of MINDA (1995).

<sup>19</sup> Cfr. DERRIDA (1989-1990); see then the volume with the same title edited by CORNELL, ROSENFELD, CARLSON (1992). For a critical survey LECKIE (1995); *A Dedication to Jacques Derrida – Introduction*, special issue of *German Law Journal*, 6, 2005, 1; CORNELL (2003); GOODRICH, HOFFMANN, ROSENFELD, VISMANN (2008); LEGRAND (2009); MICHAUT (2014).

<sup>20</sup> WHITE (1973).

<sup>21</sup> BROOKS (1996); OLSON (2014).

a nomos - a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void». «In this normative world, law and narrative are inseparably related»<sup>22</sup>. Law can be considered as just one of a wider range of diverse cultural «products». The foundations of law could be found in very deep 'literary stories'<sup>23</sup>. Both the reader and the legal interpreter would share a concern to 'deconstruct' texts. Especially in the USA where the common law tradition and the Constitution have developed furthest the Supreme Court judicial review and the creative role of judges, Law as Literature has gained a very specific audience thanks to legal hermeneutics<sup>24</sup>. «In other words, - Richard Hyland argued - it makes no sense to search for a right answer to a legal dispute in the common law. There is rarely a right answer. There are usually only narratives with different resonances. The common law has created an amazing structure in which the very concept of a correct narrative is incoherent. There are answers that, for various reasons, we like more or less, that can be appreciated for different reasons, that can be admired for their creativity and daring, but none of them is right—and virtually none of them is wrong. They are simply the meanings that particular judges have found in particular situations at particular moments. The common law has created a system that encourages judges to take personal responsibility for finding meaning in the facts and a structure that can accommodate whatever narratives those judges imagine as they pursue that quest»<sup>25</sup>.

'Imagination' therefore was one of the most controversial points of the debate on Law and Literature. The relationship between text and interpretation has inevitably been seen from different points of view. Legal imagination and the 'subjective' role of the interpreter – central in many works - were also criticized from the perspective of those who subscribed to a more formalistic idea of the text<sup>26</sup>. Also in Europe the crisis of legal formalism and positivism played a significant role in developing this debate. In this perspective law is more than a system of rules laid down by the legislator. If law is seen as a polymorphic 'normative universe', the formal institutions of law are only a part of what is involved. Law cannot exist independently of 'narratives' crea-

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22 COVER (1983), pp. 4-5.

23 For some meanings of «narrative» see also AMSTERDAM, BRUNER (2002); OST (2004).

24 On *Law as Literature* and its contribution to constitutional theory in the USA see MICHAUT (2014).

25 HYLAND (2014), § 29.

26 WEISBERG (1989); ID. (1992).

ting a 'place' and making a 'sense'. Thus Humanities contribute to the mirroring of the 'living law'.

Paolo Grossi has reminded us of Piero Calamandrei's remark to the effect that «Jurists cannot have the luxury of fantasy»<sup>27</sup>. This statement, he argues, exemplifies the narrowness of legal positivism. So far as legal positivists are concerned, words like imagination, fantasy, «creativity» are banned or at most allotted a very confined space. The legal mind bases itself on reason, logic, science, reality. Only poets, novelists, artists, it is argued, can devote themselves to imagination, passion, art, invention<sup>28</sup>. In actual fact, the jurist has his own 'imagination'<sup>29</sup>. Moreover, the *Law and Literature* movement claims that the jurist needs to develop a «specific» kind of imagination. The literary imagination appears to be a broad field offering many different paradigms. The idea of «legal invention»<sup>30</sup> – *sub specie inventionis* – has recovered from the end of the nineteenth century onwards a richer concept of law carried out through interpretation<sup>31</sup> and the performance of a more «dynamic» role by the jurist, with the judges (and Constitutional Courts) to the fore. In 1994 Martha Nussbaum was invited to offer a course at the University of Chicago on «Law and Literature»<sup>32</sup>. The American philosopher pointed out how «literary imagination» opened up a wider political and moral theory and «counterbalanced» the Law and Economics approach. In some respects, literary works can contribute to the giving of correct responses to social issues. «Poetic justice» allows us to «humanize the law and the lawyers». Imagination can help judges to identify with the relevant parties, thus rendering them better able to deal with moral values and social questions. According to James Boyd White, literary jurisprudence can explain the values and inform the choices to be made in the fashioning of a more coherent, fair and just legal environment. Literature can broaden or deepen a problem, demystify law's claims, encourage self- and social criticism, provide impetus for change. «What literature has most to teach us is how to put our habitual methods of thought in question, how to think about, criticize, and reform them»<sup>33</sup>.

27 CALAMANDREI (1942), p. 176, in P. Grossi (1986), p. 589. Cfr. the analysis of CARTA (2005).

28 For a deep analysis see COSTA (1995).

29 COSTA (1995), pp. 29-34.

30 See GROSSI (2016) and ID. (2003).

31 COSTA (1995).

32 NUSSBAUM (1995).

33 WHITE (1989), p. 2028.

In this perspective, Law and Literature has an impact on teaching, presupposing as it does a «shift in legal education» and a criticism of those lawyers who look at the detail rather than the wider issues and who evaluate problems and people in terms of their legal relevance rather than the broader moral and social context. Some recurring themes can be useful both to Law students and Humanists: the relationships between natural and positive law, the issue of obedience to the law, the relationships between law and justice, justice and revenge, law and equity, law and punishment, rule and discretion, adjudication and conciliation, justice and social order, law and power, order and hierarchy, the assumption of free will and other topics. This path could offer insights into law that may elude us when legal studies restrict themselves to analysing legal rules and principles in isolation from other disciplines. In this sense legal education should involve training law students to grasp the ‘humanist’ features of legal science.

If this is what is at stake, we can then realize why *Law and Humanities* is (above all in the USA) a controversial combination characterized by a strong politico-ideological debate<sup>34</sup>. We might recall the controversy in the 1980s between the leader of the *Law and Economics* movement, Judge Richard Posner, and Robin West<sup>35</sup>, or again Posner<sup>36</sup> versus Weisberg, White’s reply to Posner<sup>37</sup>, or some of Martha Nussbaum’s ideas, showing thus how Law and Literature encompasses very different visions and conflicting positions deriving from both left-liberal and right-conservative agendas.

### 3. How?

Faced with this approach can (History of) Law offer something specific and useful? Can legal history receive positive feedback from *Law and Humanities*? In this last part of my talk I would like to offer some remarks about these questions.

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34 «My point is not that literature is a politics-free zone. It is no more so than law is»: POSNER (2009<sup>3</sup>), p. 16.

35 WEST (1985-1986); POSNER (1986). See also again WEST (1986).

36 POSNER (1988).

37 WHITE (1989): «The heart of the difficulty is that Judge Posner does not treat literature as literature, but as the material for a kind of argument that is itself most unliterary in spirit. Thus while one might think from its title, and from much of what Judge Posner himself says, that this book is meant as a (gently corrective) contribution to the movement that seeks to connect law and literature in significant ways, it is in fact written against it in nearly every sentence». For a useful overview see CAMILLERI (1980).

In recent decades legal systems and legal education have developed more and more in terms of «technicisation» and «hyperspecialisation». The emergence of the Law and Literature movement from the 1970s onwards is also linked to these kinds of transformation and can be seen as «a response to the widely proclaimed inadequacies of current legal education, as well as to the perceived limitations in legal analysis. The law and literature movement is at the cutting edge of contemporary legal thought»<sup>38</sup>. In this context legal history seems to be a natural ‘meeting point’ between *Law and the Humanities*. Elective affinities connect these areas. In fact what I defined at the beginning of my speech as the ‘difficult position’ and ‘hybrid epistemological status’ of legal history here in fact becomes a significant opportunity. The legal historian is normally a jurist moving between the Humanities and the Social Sciences. She/He is in some respects a cultural mediator and has (or should have) a propensity to consider law as a complex normative universe. However (history of) law should not be indifferent to the Law and Literature approach; at the same time (history of) law cannot be considered simply as another way to make literature<sup>39</sup>. Law is a technical language but is also an historical product, a whole *Weltanschauung*, a social dimension, a moral vision. You can separate these aspects, but you risk impoverishing and isolating the legal phenomenon. For a long time law was part and parcel of the general culture shared by writers, artists, educated people.

«Law-related literature in particular could provide lessons in legal history as well as enhance our appreciation of the impact of law on the society in which it operates»<sup>40</sup>. Legal historians and (other) humanists strive to decipher a specific experience both as a ‘global reality’ and as knowledge of social life. Humanists and legal historians are both ‘travellers’, in space and in time, looking beyond borders and boundaries, including those of our national legal

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38 CAMILLERI (1980), p. 557. «Taken together these works and others like them constitute a movement, not in the political sense of the term, for there are no leaders, no manifestoes, no agendas, and no common program, but in a larger sense, as one might think of movements of the earth. What has happened is that many minds, to some degree independently from each other, and moved by somewhat different hopes and interests, have turned from the language of social science that has so dominated legal thought for the last fifty years to the humanities, and in doing so have expressed a widespread sense of the inadequacy of our current languages (and texts) to our experience of law and legal criticism»: WHITE (1989), p. 2026.

39 Cfr. QUAGLIONI (2005).

40 ARISTODEMOU (1993), p. 167.



systems, which are themselves products of history. I think the point made by Mario Sbriccoli in 1985 is still valid. Citing some remarks by Foucault, he spoke of the need to go beyond our discipline, taking care to improve our tools and widen our horizons. «Small steps towards a moderate and careful “dedisciplinarisation” (dedisciplinarizzazione) are the condition for being better understood by other historians, the premise for opening up more successfully to the understanding of what others do (...) and are the circumstance necessary to create within our work themes and objects of study, the space for the entry of new historiographical problems, new fertilizing themes, new research objects»<sup>41</sup>.

Today this discourse invites us to open new horizons, going beyond boundaries<sup>42</sup>, de-nationalising them. It makes real sense in a world that we consider to be based on legal diversity and on relational networks<sup>43</sup>. We are by now far removed from the traditional Eurocentric vision. Post-colonial beliefs have been overcome and Western legal orders are no longer dogmas<sup>44</sup>. This point of view tends naturally to demystify the excessively simplified use of ‘general’ typologies, models and clichés. We need to transcend the disciplinary divide between legal history and other disciplines in social sciences studying the same set of phenomena<sup>45</sup>. Legal history has to deal with an enlargement of scale. The spatiotemporal «revolution» emphasized by the dynamics of globalization raises new questions for legal historians. A «spacing history» solicits the design of new intellectual tools<sup>46</sup>. The more societies become heterogeneous, multicultural and multi-confessional, the more the rule of law is subject to various forms of hybridization and «entanglement». Multinormativity is a concept by no means to legal historians. Of course, bearing in mind that the profound changes that are taking place at a global level do not entail, as has rightly been observed, the abandonment of the traditional perspective of regional and local studies. These latter are fundamental and indeed gain further importance if interconnected with a broader dimension<sup>47</sup>.

*Law and Humanities* can be another way to test these concepts and new

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41 SBRICCOLI (1986) (= 2009, v. II, p. 1122).

42 About several kinds of boundaries – subject-matter, disciplinary, and geographical – in current comparative law, see TUSHNET (2017).

43 I follow the conclusions of WILFFELS (2017), pp. 202-203.

44 WILFFELS (2008), pp. 230-235.

45 See VON BOGDANDY (2012), p. 624.

46 COSTA (2016).

47 DUVE (2014) and Id. (2016).

concerns. «What are the improvements a Law and Humanities approach affords to the framework defined by the instruments of historical research? How can a deeper awareness of common interpretation and representation sharpen the cognitive instruments of the historian?». These are basic questions. «We speak often about interdisciplinarity, but this one «(...) must be understood properly as a dialogue between experts in different fields and should not simply entail an uncritical adoption of methods and sources from another discipline. Indeed, legal historians must be prepared to accept that while fresh insights are possible (such as those that can be derived from analysing visual sources) there are limitations to such an approach»<sup>48</sup>.

So when we address the question «How are we to manage a History of Law and Humanities approach?», the response paradoxically be “easy”: the topic is so polymorphous and heterogeneous that I would suggest that it cannot really be reduced to a single method.

I can only tell you how I have followed this approach by supplying a number of examples.

Being interested in legal culture during the Nineteenth Century I have read and studied, among many others, Stendhal and Balzac. We know how important in general are their (different) *Weltanschauungen* to understanding better the transformations of bourgeois society. But «Law in Literature» can offer here some further specific and useful insights. When I studied the French constitutional and political system during the July Monarchy I wrote an article on Stendhal’s unfinished novel known by the title *Leucien Leuwen*<sup>49</sup>. But one of several titles used by Stendhal during the drafting of his novel was *The Telegraph* because this instrument was the real protagonist of the second part. Stendhal lets us see how the governments and the prefects used the telegraph to win political elections and to speculate on the stock market. Reading this book we can understand in-depth some aspects of the French political system and its constitutional background.

*Une ténébreuse affaire* is one of the first ‘judicial novels’ published by Balzac in 1841<sup>50</sup>. Set during the Napoleonic period, it is a story of spies and plots, and of a criminal trial. Balzac, «romancier du droit»<sup>51</sup>, «juge d’instruction

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48 MUSSON, STEBBINGS (2012), p. 2.

49 LACCHÈ (2002).

50 See my commentary on the German version in LACCHÈ (2018).

51 DISSAUX (2012).

de notre 'desordre social'»<sup>52</sup> sees as few others have done the «constitutive» dimension of law, makes it very concrete, sometimes a subterranean presence but very often the actual protagonist of his novels, represented by single legal institutions (property, family, successions, obligations, interdiction, etc.), the code par excellence, the Napoleonic civil code, the professions of judge, lawyer, chancellor, notary. The 'legal discourse' in Balzac is rarely a pretext; it is almost always a 'necessity'. In this novel Honoré de Balzac apprehends the 'spirit' of modern justice after the French Revolution and the relationship between justice and the public sphere.

Visual arts and iconology have played an important role in developing Law and Humanities<sup>53</sup>. A discussion on the diverse relationships between (history of) law and the artistic image followed, focusing on the complex and often hidden interdependence of law and art. Lodovico Zdekauer (1855-1924), of Bohemian origin, was a legal historian who worked in Italy, in Tuscany and the Marches, and can be considered one of the European pioneers in the «iconography of justice»<sup>54</sup>. In 1908 he delivered at the University of Macerata an inaugural lecture on «L'idea della Giustizia e la sua immagine nelle arti figurative»<sup>55</sup>. Zdekauer studied the relationship between image and idea of justice in many sources, from Roman history to the modern age, identifying several themes subsequently widely developed in the course of the Twentieth Century.

Another field I have begun to consider is architecture and the visual arts during Fascism<sup>56</sup>. It was an important element within the regime's overall strategy of building an «integrated system» formed by ideologies, doctrines, institutions and prevention and repression activities. Justice was of paramount importance in institutionalizing the new political order and in imparting a direction to the new state. The architecture of justice also played a major role in representing Fascist ideologies. This aspect - the relationships between the architecture of justice and Fascist strategies and policies - has been unduly neglected. And yet it is an important field, and one that allows us to consider together two of the pillars of the Fascist experiment: the criminal

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52 MOURIER (1996), p. 115.

53 DOUZINAS, NEAD (1999); WAGNER, SHERWIN (2013); GEPHART, LEKO (2017); HUYGEBART, MARTYN. PAUMEN, BOUSMAR, ROUSSEAUX (2018).

54 LACCHÈ (2016a).

55 ZDEKAUER (1909); see also Id. (1913).

56 LACCHÈ (2019).

law system and an ‘aestheticized’ ideology founded upon force and justice. Architectural forms performed Fascist justice. Like other totalitarian regimes, Fascist architecture as massiveness<sup>57</sup> incorporated an aesthetic dimension of justice. Milan’s Palace of Justice had perforce to be the loftiest expression of this orientation. It is a little-known fact that the Milan Palace of Justice – a mixture of modernism and monumental neoclassicism – is probably one of the richest edifices in terms of images and symbols of justice to have been built during the twentieth century, and not only in Italy.

Humanities – in a genuinely interdisciplinary approach – can also offer legal historians categories, images and metaphors useful in the representing of an historical legal phenomenon. I can give two examples drawn from my own research.

Recent studies have insisted, more than in the past, on the complex «stratification» of legal cultures<sup>58</sup>. Theory and practice, law and jurisprudence, codification and doctrine, academy and legal professions are not separate worlds. I myself coined, for example, the concept of «eclectic canon»<sup>59</sup> to discuss the traditional representation of Italian legal culture between the nineteenth and twentieth centuries. I argued that Italian legal culture has national roots and is a deep stratum. It does not produce a system or a legal order. It deals above all with the *habitus*, the way of being of a jurist. It deals also with the idea that Italian culture from the Restoration period ought not to be seen as a «crisis period» before the birth of the «scientifica era» in the second half of the century when the scientific paradigm, or so the argument went, had prevailed against pragmatism, the exegetical approach and eclecticism. The term «canon» – widely conceptualized by literary critics<sup>60</sup> – evokes the consolidation of a core of jurists and authors, principles and themes establishing a common lexicon, shared categories and concerns.

Another image/metaphor I have used is that of the polyptych<sup>61</sup> to represent constitutional phenomena. Each ‘constitutional’ painting closely resembles a huge polyptych. At the centre the «ancona» may portray the *Maestà* or the crucifixion of Jesus Christ, but polyptychs are ambitious works and

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57 Following some suggestions in CANETTI (2000), see ABENSOUR (1997).

58 On cultural contexts and legal imagery who form the *epistème* of modern law see the fundamental reflexions of HESPANHA (2017).

59 LACCHÈ (2010); ID. (2017).

60 I think above all to the controversial BLOOM (1994).

61 LACCHÈ (2016b).

so are enriched with predellas, *cimase*, cusps, panels with lives of the Saints, angels, miniature landscapes, the whole enclosed by massive gold frames. Those who cultivate constitutional history resemble art historians trying to reconstitute polyptychs whose parts have been scattered across different sites and museums. Each 'part' makes 'sense', has *value*, and can be looked at in its own right, but the 'constitutional frameworks' and the 'constitutional factors' are the continuous composition and decomposition of the parts in the whole, between past, present and future. We can observe each predella as if it had a certain autonomy, but everything changes once our gaze takes in the polyptych as a whole. Now we can see the internal dialogue, the cross-references, the multiplicity of perspectives. The ancona of our polyptych is what we call constitution (our *Maestà*) and all around there are the forms of society, politics, the economy, anthropology, culture and so on.

Talking to young legal historians I believe that it is also important to highlight the two faces of the 'coin'. The (history) of law and humanities approach is challenging, attractive, but not devoid of risks. Richard Posner was quite right to point out two major dangers: «One is amateurishness – the plague of interdisciplinarity: the lawyer writing about literature without literary sensitivity or acquaintance with the relevant literary scholarship, the literary scholar writing about law without legal understanding»; «Other problems that beset the field are an absence of well-defined boundaries and a resulting lack of coherence...»<sup>62</sup>. It does mean: taking it seriously. We need to go beyond mere erudition, seeking out all that is 'quaint', and to evade the ever-present danger of 'banalization'.

In conclusion, if pressed to say why I am interested in this broad «field», being mindful of both its positive and its less positive aspects, I would recall Honoré de Balzac. He used to say that (real) artists have a privilege in every period: they are like prophets, the only ones coming near to «look[ing] beyond the invisible». I think that he was right. Imagination is therefore anything but a «luxury». In her «Poetic Justice» (1995) Martha Nussbaum quoted Walter Whitman. The American poet has written that the literary man's imagination sees eternity in human beings. He doesn't see men and women as dreams or dust. I don't know whether or not Law and Humanities approaches can truly build a new humanistic ethics or make better judges, lawyers and legislators, thereby enhancing legal activities. Literature really does in fact bring on to the stage and represent the structural force of the law and thus expresses ae-

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62 POSNER (2009<sup>3</sup>), pp. 6-7

sthetically and in a critical way a particular form of life and the legal field. Be this as it may, I believe that we need to cultivate a link with the artists: to try understand better a 'thing' so 'invisible' and endless as law.

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Chapter I

Iconography of Law



# A LEGAL STUDY OF MEDIEVAL CITIES FROM THE 11<sup>th</sup> TO 14<sup>th</sup> CENTURIES: THE EXAMPLE OF SIGILLOGRAPHY IN FRANCE

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The oldest seals we know are Mesopotamians<sup>1</sup> and the validation of legal acts by a seal is a direct heritage of Antiquity<sup>2</sup>. The seal authentication was, in the Middle Ages, a royal<sup>3</sup> and imperial privilege<sup>4</sup>. During the 11<sup>th</sup> century, in the western Europe, and especially in Germany, France, Belgium and England, princes and bishops<sup>5</sup> began to seal their charters<sup>6</sup>. Then, during the 12<sup>th</sup> and 13<sup>th</sup> centuries, the use of seals spread in the feudal society among the secular lords and the bourgeois of medieval cities<sup>7</sup>. Sigillography, auxiliary science of history, is the study of seals: their existence, their uses and their iconography<sup>8</sup>.

In the Middle Ages, the possession, the use and the conservation of one or more urban seal was the proof of the self-governed of the cities (I). Moreover, the urban seal was used to authenticate many civil and commercial law acts enacted by bourgeois, this is the voluntary jurisdiction of the medieval cities (II). Finally, the seal's iconography, the image which is carved on the seal provides, among others, an indication on the degree of urban autonomy and on the representation that the city has of itself (III).

## *1. Sigillography and urban autonomy*

In the crown lands of France, Louis VI, called the Fat or the Fighter (c. 1081-1137), was the first to have promoted the communal movement<sup>9</sup>. Indeed, in 1110, Mantes, near Paris, was the first city to become a commu-

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1 BAUTIER (1990), pp. 123 ss.

2 BAUTIER (1990), pp. 130-134.

3 BAUTIER (1984), pp. 29-30, p. 37 and 39-40.

4 CHASSEL (2004), p. 1293.

5 ROUMY (2015), pp. 491-492 and 512-513.

6 CHASSEL (2004).

7 CHASSEL (2004).

8 SAMARAN (1986), p. 394.

9 PETIT-DUTAILLIS (1936), p. 100.

ne<sup>10</sup>. Louis VII of France, called the Younger or the Young (1120-1180), confirmed most of the communes of his predecessor and the king also conceded new communes even if, Abbot Suger of Saint-Denis (c. 1081-1151) halted the movement of charter concessions<sup>11</sup>. Indeed, Louis VI of France, during his reign, conceded a charter of commune to the city of Reims (1138) withdrawn in 1140, a charter of commune to Sens (1146), withdrawn in 1147, Vezelay had a common charter since 1152, which was withdrawn to the city in 1155<sup>12</sup>. Furthermore, the communal concessions of Orléans and Poitiers were broken<sup>13</sup>. Louis VI of France granted one last written charter as the city of Compiègne, in the north of Paris, in 1153<sup>14</sup>.

Finally, since the reign of Philip II, called Philip Augustus (1165-1223), the concession of a commune charter became a royal monopoly<sup>15</sup>. Indeed, at first, the recognition of a commune and the granted of charters could be made by a feudal lord, a prince, an archbishop or a bishop of a city, but thanks to the many concessions of Louis VI and Louis VII, it became an exclusive royal privilege just with Philip II<sup>16</sup>.

The first known urban seals appeared during the 12<sup>th</sup> century<sup>17</sup>. The commune of Compiègne owned its seal since 1174<sup>18</sup>. Indeed, the city sealed its oldest legal act in 1174<sup>19</sup>. But in 1319, the city was so indebted that it requested from the king the suppression of the commune<sup>20</sup>. Philipp V, called the Tall (1293-1322), withdrew the seal of Compiègne<sup>21</sup>. The city could no longer produce legal acts. In the same way, in 1254, the city of Ussel in the south-west of France that had a consulate since 1218, abandoned its seal and the use of a sealing officer, distinct from the town clerk, because of the cost it represented<sup>22</sup>. Thus, the possession of an urban seal was an evidence of the legal

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10 FRANÇOIS, BERGOUX (2000), p. 54.

11 SCHNEIDER (1990), p. 21.

12 SCHNEIDER (1990), p. 21.

13 SCHNEIDER (1990), p. 21.

14 CAROLUS-BARRÉ (1952) p. 87.

15 PETIT-DUTAILLIS (1936), p. 99 and VERMEESCH (1966), p. 177.

16 *Ibidem*.

17 DEGOUZON (2014), p. 82.

18 CAROLUS-BARRÉ (1938), p. 126.

19 CAROLUS-BARRÉ (1938), p. 132.

20 *Ibidem*.

21 CAROLUS-BARRÉ (1942), p. 3.

22 LEMAÎTRE (1969), pp. 138-139.



autonomy of cities. But the revocation of the right to have a it symbolizes the end of the self-governed cities.

Some consulate cities in the south-west of France also had a seal, during the 13<sup>th</sup> century, Agen, for instance, owned several seals.<sup>23</sup> The great seal was used to authenticate the most important acts of the city<sup>24</sup>. In the same way, the capitouls of Toulouse, since the 13<sup>th</sup> century, had a notary who affixed the great seal of the consulate on the acts of urban administration<sup>25</sup>. Indeed, the seals were very different: single-sided seal, two-sided seal, *bullae*, counter-seal<sup>26</sup>. Here, the possession of several seals indicates a significant and diversified legal activity. It was the proof of the control by the city of the production of its law. Moreover, the existence of at least two seals indicates a hierarchy between the various legal acts of the consulate.

In fact, if the urban seal served to authenticate the acts of the commune, it was also used to seal the proxies given by the city to a specific person, an officer of the city or not, who represented the city to the king, princes, feudal lords, or other cities<sup>27</sup>. It was the case of Saint-Quentin, in the north of France, during the 14<sup>th</sup> century<sup>28</sup>. But cities also used seals to authenticate agreements with another city, as illustrated by the transaction between the rectors of Marseille and the consulate of Nice in 1219<sup>29</sup>, or with a feudal lord, such as, for instance, the transaction between Ramon Berenguer IV count of Provence (1198-1245) and the commune of Marseille in 1225<sup>30</sup>. Finally, the

23 DUCOM (1892), p. 193.

24 DUCOM (1892), p. 220.

25 MUNDY (1954), p. 121.

26 FABRE (2001), pp. 100-113.

27 CHÉNON (1922-1923), p. 356.

28 «Pour seel et escripture a Cambray, tabellyon, pour procurations faites contre les dis rentiers a Noyon pour deffendre le ville, XIII sous», Lemaire (1888), p. 314.

29 «(...) in praesentia mei Rostagni Payni, publici massiliensis notarii, qui mandato praedictarum partium haec scripsi et signum meum apposui et insuper ad maiorem omnium praedictorum firmitatem et ad omnem inde tollendam dubietatem supra praedictis, si aliquis possit oriri scrupulus quaestionis, praesens instrumentum bullae plumbae dictorum rectorum munimine, jussu ipsorum rectorum, roboravi» and French translation «(...) en présence de moi Rostang Pain, notaire public à Marseille qui par l'ordre des susdites parties ai écrit ces choses et y ai apposé mon signe, et de plus, pour le maintien de ces choses et pour écarter tout doute sur ce présent acte, je l'ai, par ordre des recteurs, muni de la bulle de plomb des susdits recteurs», MÉRY (1941b), p. 279.

30 «(...) Ego Guillelmus Imbertus, publicus notarius Massiliensis, huic transcripto de originali instrumento sumpto subscripsi et signum meum apposui, et ad maiorem proe-

city of Marseille used its *bullā consulum* to confer legal validity to the confirmation of the privileges granted always by the count of Provence, in 1184<sup>31</sup>.

In addition, the seal could not be used for private purposes by officers and members of the urban administration and so in 1269, the mayor of Saint-Riquier, in the north of France, Robert Tarquaise was tried for fraudulent use of the seal and ordered to pay a heavy fine<sup>32</sup>. However, the notary of a commune could draft private acts for the consuls of the city if they were not authenticated with the seal of the city, as it was the case, for instance, in Genova, in Italy, during the 12<sup>th</sup> century<sup>33</sup>.

Since the 12<sup>th</sup> century the seal came with the urban liberties. In Italy, again Genova had a seal in 1139, Pavia in 1140, Venezia in 1145, Roma in 1148, Piacenza in 1154, Pisa in 1160, Lucca in 1170<sup>34</sup>. Later in France, in the north, Arras had a seal 1175, in the south, Nice had one in 1177 and Arles in 1180<sup>35</sup>. Afterwards, the seal spread in many cities in the north, west, south and east of France, but also in the Holy Roman Empire<sup>36</sup>.

In the same way, during the 13<sup>th</sup> century, in the south-east of France, in Provence, the consulate city of Marseille owned several seals and a consulate bull<sup>37</sup>. Moreover, the urban administration of Marseille had its own officer to retain and seal the acts of the city with the *bullā consulum*<sup>38</sup>. These two nota-

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cedentum firmitatem sigillo communis Massilioe sigillavi» and French translation «Moi Guillaume Imbert, notaire public à Marseille, ai copié ceci de l'original et l'ai signé, et pour la garantie de ce qui précède, j'y ai apposé le sceau de la commune de Marseille», MÉRY (1941c), p. 304 and 307.

31 «Ego Bredimondus Jobinius, publicus Massiliensis notarius, hoc proesens translatum duplici originali instrumento transcripsi, nil addens et diminuens nisi sicut in dicto originali ipso et signum quod consuetus siim apponere in instrumentis aute publice factis in hoc prasenti translato apposui, et ad maiorem fidem adhibendam hoc praesens translatum fuit sigillo communi Massiliensis roboratum» and French translation «Moi, Bredimond Jobin, notaire public à Marseille, ai transcrit ce présent acte, fait à double original; n'y ajoutant et n'en diminuant rien, et j'y ai apposé la signature que j'ai la coutume de mettre au bas des actes publics; et pour qu'une plus grande foi y fût ajoutée, cette présente copie a été scellée du sceau de la commune de Marseille», MÉRY (1841a), pp. 188-189.

32 CHÉNON (1922-1923), p. 356.

33 ABULAFIA (2005), p. 17.

34 BOUCHERON (2011), p. 312 and BAUTIER (1990b), p. 153.

35 BAUTIER (1990b), p. 154.

36 *Ibidem*.

37 «(...) bullam et sigilla (...)», art. 9, §5. a. *De officialibus mutandis*, PÉRON (1949), p. 22.

38 «Item statuimus quod illi duo notarii qui statuti erunt in Palacio debeant habere

ries were the only ones who could use the urban seals<sup>39</sup>. In the Holy Roman Empire, in Strasbourg, in the east of France, during the 13<sup>th</sup> and 14<sup>th</sup> century, it was also the town clerk called *Stadtschreiber* and later *Protonotarius* who was responsible for the sealing of the urban acts<sup>40</sup>. The city's appointment of urban sealers was another evidence of the self-governed cities. Sometimes, it was several people who sealed together the act. In Libourne, in the south-west of France, the outgoing mayor, the jurats with the other assembled bourgeois had to close the accounts; then, together, they written receipts sealed by the mayor, the sub-mayor, the jurats, the town clerk, the treasurers and the sergeants, during the 14<sup>th</sup> century<sup>41</sup>.

In the west of France, the institutions of the cities of Rouen called in French *Les Établissements de Rouen*, also had their seals<sup>42</sup>. The town clerk of Rouen, in Normandy, was the sealer of legal acts of the city<sup>43</sup>, since notaries were not yet established among the officers of the communes in the 14<sup>th</sup> century<sup>44</sup>. Sometimes, the town clerk affixed on the urban acts its own seal. In the Holy Roman Empire, in Besançon, in the east of France, the secretary attested the acts with the seal of the city along with his seal of officer; this made it possible to know that the act had been drafted and authenticated by the secretary himself<sup>45</sup>.

The seals had to be protected physically, thus the notaries of Marseille were also the only and exclusive keepers of the urban seals, since the 13<sup>th</sup> century<sup>46</sup>. Also, in Provence, the city of Arles planned for the safekeeping of the

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et tenere, quamdiu erunt in illo officio, bullam et sigilla omnia cum quibus huc usque consuetum est bullari et sigillari instrumenta et litteras que fiunt in Palacio et mittuntur extra», *ibidem*.

39 «Et nullus alius nisi dicti duo notarii possit litteras sigillare in Palacio (...)», *idem ut supra*.

40 LIVET, RAPP (1981), p. 114.

41 BÉMONT (1917), p. 249.

42 VALIN (1924), p. 19.

43 *Ibidem*.

44 MURRAY (1986), pp. 155-156.

45 CARVALHO (1996), p. 3.

46 «Item statuimus quod illi duo notarii qui statuti erunt in Palacio debeant habere et tenere, quamdiu erunt in illo officio, bullam et sigilla omnia cum quibus huc usque consuetum est bullari et sigillari instrumenta et litteras que fiunt in Palacio et mittuntur extra», *ibidem*.

seal by the notaries of consulate or by another notary of the city<sup>47</sup>. In the same way, in the 13<sup>th</sup> century, the consulate of Avignon's notary was the guardian of the urban seal also called the *bullā consulū*, but only in the absence of consuls<sup>48</sup>. But the seal keeper evolved and passed from the notary of urban administration to a specific officer, called the seal guard, in French, the *garde-scel*, from 1236 in Padua<sup>49</sup> and from 1250 in Bologna, for instance<sup>50</sup>.

In the north of France, Valenciennes became a commune in 1114.<sup>51</sup> The city received its seal in 1155.<sup>52</sup> Because of their importance to self-governed cities the seals never left the city<sup>53</sup>. When they were not used, they were kept in a locked chest with eight keys as just in Valenciennes, according to a statute of John II of Avesnes, count of Hainaut (1247-1304), given in 1302<sup>54</sup>. Only once, the town clerk of Valenciennes, master Nicolas Dury, secretly brought the seal to Mons, in Belgium. In other cases, some of the representatives of the city of Valenciennes in Mons returned to their city to seal the urban acts<sup>55</sup>. In the east of France, in Lorraine, the town clerk of Metz was the only one to have the keys of the room of the cathedral in which the seal of the city was locked<sup>56</sup> because he was the only one who could use the seal as in Marseille<sup>57</sup>.

But the seal also received a legal protection, for instance, in the west of France, in Poitiers, where the prince of Gall conceded, in 1369, criminal and civil justices to the mayor of the city, excepted the cases of high justice, among which the crime of falsification of seals<sup>58</sup>. Moreover, to prevent the falsification of their seals, the urban authorities also resorted to counter-seal<sup>59</sup>. Therefore, the seals received their own legal and physical protection.

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47 «Constituantur duo notarii qui stent cum consulibus ad recipiendum libellos et injurias scribendas et audiendas, et quod illi duo notarii vel alter eorum teneant sigillum cupreum communis», art. 161, *Quod consules libellos preceptorios*, GIRAUD (1846), p. 238.

48 HOLLARD (2001), p. 157 and LEROY (2008), p. 157.

49 WALEY (1969), p. 75.

50 HESSEL (1975), p. 187.

51 GUIGNET (2006), p. 26.

52 GUIGNET (2006), p. 38.

53 CAFFIAUX (1866), p. 105.

54 CAFFIAUX (1866), p. 104.

55 CAFFIAUX (1866), p. 105.

56 MENDEL (1932), p. 237.

57 KLIPPFEL (1867), p. 177.

58 GIRY (1883), pp. 366-367.

59 BÉDOS (1980b), p. 163.

Indeed, the loss of its seal was terrible for a commune. In Flanders, Gand was a commune city and in 1277, the count of Flanders, Margaret II called Margaret of Constantinople (1202-1280), temporarily removed the city seal to submit the aldermen to his authority.<sup>60</sup> This city could no longer produce legal acts<sup>61</sup>. In the same way, in Bordeaux, in the South-West of France, in 1311, a factional conflict resulted, in the appointment of the mayor, the resignation of the fifty jurats<sup>62</sup>. In the city hall, the faction of the resigned jurats seized the communal seal which was broken because of the numerous excesses and extortions committed by the town clerk, master Elie de Pommiers; during a brief period, the city could no longer produce legal acts until the replacement of the seal by the English king<sup>63</sup>.

However, not all cities that owned a seal were communes or consulates. For instance, Calais, in the north of France, had a seal in 1228<sup>64</sup>. But the city was never a commune in the Middle Ages<sup>65</sup>. In the same way, in Toul, in the east of France, the tabellionage sealed all the acts, included the acts of urban administration of the city, but the city was not a commune<sup>66</sup>. Likewise, Cognac, in the south-west of France, became a commune in 1215. After the disappearance of the commune since 1220's, the communal seal kept being used by the city<sup>67</sup>.

Furthermore, the seal was not sufficient to identify a commune. For instance, Cologne, in the Holy Roman Empire, had an urban seal in 1119 at the latest, but remained under the authority of the archbishop<sup>68</sup>. Only in the 13<sup>th</sup> century the city became a self-governed city and it began to seal its acts of administration for itself<sup>69</sup>. Contrarily, some self-governed cities had a seal only belatedly; for instance, Nevers, in the middle of France, had a franchise charter in 1237<sup>70</sup> but the city only had a seal in 1470<sup>71</sup>.

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60 BÉDOS (1980b), p. 104.

61 WARINKÖENIG (1846), p. 103.

62 BÉMONT (1916), p. 264.

63 *Ibidem*.

64 LENNEL (1909), p. 157.

65 DERVILLE, VION (1985), p. 34.

66 SCHNEIDER (1973a), p. 278.

67 GIRY (1883), p. 274.

68 BAUTIER (1990b), p. 152.

69 DELUMEAU (1998), p. 508.

70 MASSÉ (1938), pp. 139-140.

71 CHARRIER, CHABROLIN, STAINMESSE (1984), p. 90.

Moreover, in the end of the Middle Ages, sealing was no longer the only process used to ensure the recognition of the legal acts of a city. Indeed, in the north-west of France, the town clerk of Rouen, in Normandie, sometimes signed the charters sent by the city<sup>72</sup>. In the same way, in Bayonne, in the south-west of France, the notary of the city signed a sealed act in 1327, but this time, it was a charter appointing an officer of the city, an act for itself<sup>73</sup>. In the north of France, in Aire-sur-la-Lys, the town clerk sealed and signed many urban acts, from in 1227 and 1228<sup>74</sup>.

In the south-east of France, in Arles, in Provence, during the first decades of the 13<sup>th</sup> century, the *notarius consulum* signed many urban acts but the signature was only an additional element to the validity of charters<sup>75</sup>. At the end of the 13<sup>th</sup> century, some signed but unsealed urban acts were considered valid<sup>76</sup>. At last, the presence of a witness was still a means of ensuring the legal validity of an urban act, in the 14<sup>th</sup> century, for instance in the provost city of Marseille, in Provence, in 1318<sup>77</sup>.

So, the urban seal affixed to the charters written by the cities informs us about the political, legal and administrative autonomy of the city. The possession, the use and the conservation of the seal constituted a marker of power of the city and of the town clerk within the administration of the city. It was materially and legally protected because its loss prevented the city from producing legal acts. What's more, the urban seal was used to authenticate many civil and commercial law acts enacted by bourgeois. Some cities had the monopoly of the voluntary jurisdiction.

## 2. Sigillography and urban voluntary jurisdiction

The voluntary jurisdiction was the public authentication of a private act, apart from any litigation. This jurisdiction was expanded, mostly, in the cities

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<sup>72</sup> VALIN (1924), p. 19.

<sup>73</sup> GIRY (1883), p. 152.

<sup>74</sup> «Quod ut ratum habeatur et firmum, presens scriptum inde confectum per manum Johannis Speket clerici nostri traddimus signatum sigillo et scabinorum Ariensium» (1227) and «Quod ut ratum habeatur et firmum, presens scriptum inde confectum (manibus Johannis Speket clerici nostri) duximus signandum sigilli majoris et scabinorum Ariensium (...)» (1228), DELMAIRE (2000), p. 112.

<sup>75</sup> BALOSSINO (2008), p. 191.

<sup>76</sup> *Ibidem*.

<sup>77</sup> MABILLY (1905), p. 223.

of the north of France during the 13<sup>th</sup> century. The aldermen had three options: the writing of testimonies, as for instance in Montpellier, in the south of France<sup>78</sup>, the drafting of a charter-party, as in Douai, in the north<sup>79</sup>, and the affixing of the seal, in most cities<sup>80</sup>. However, testimony was effective for a limited period and in the same way, the charter-party was limited to only three copies and no more<sup>81</sup>. Since then, the seal was a success because of its durability and usability.

Thus, Aire-sur-la-Lys, in the north of France, had in 1224 an urban voluntary jurisdiction<sup>82</sup>. The commune used the single seal of the city. This seal was affixed to the acts of the bourgeois since 1198.<sup>83</sup> But the number of charters to be authenticated increased. So, a seal dedicated to these bourgeois' charters appeared in the commune in 1244<sup>84</sup>. In the other cities like Laon, in the north of France, which was a city of commune since 1116<sup>85</sup>, the urban voluntary jurisdiction of the city was born around 1250<sup>86</sup>.

Some writers of the city were specifically dedicated to this voluntary jurisdiction<sup>87</sup>. In the city of Gand, in Flanders, a single town clerk was dedicated to sealing the acts of bourgeois<sup>88</sup> as in Provins, near Paris, in 1289<sup>89</sup>. In the Holy Roman Empire, in Haguenau, in the east of France, from 1362, the town clerk called *Shöffenschreiber* wrote the acts of voluntary jurisdiction that had to be authenticated by the personal seal of one of the magistrates of the city<sup>90</sup>.

In the same way, in the south of France, in Languedoc, Montpellier had an urban voluntary jurisdiction since 1204. The bourgeois paid the city for the affixing of the seal<sup>91</sup>. Indeed, the authentication of commercial acts rep-

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78 OUDOT DE DAINVILLE, GOURON, VALLS (1984), p. 59.

79 DEHAISNES (1868), p. 146.

80 BEDOS (1980a), *passim*.

81 SCHMIDT (1993), p. 34-35.

82 BERTIN (1946), p. 53.

83 *Ibidem*.

84 *Ibidem*.

85 DESPORTES (1988), p. 265.

86 SAINT-DENIS (1994), p. 491.

87 *Ibidem*.

88 WARNKÖENIG (1846), p. 144.

89 «(...) Guarin li tisserane de Chanetrone vint par devant Robert Gifart maieur, et par devant Jaque de Marivas, clerc de la commune (...)», D'AURIAC, PROU (1993), p. 123.

90 GRASSER, TRABAND (1999), p. 48.

91 «(...) Et si quis bullaverit propria voluntate, non det pro bulla nisi vi. denarios, et

resented an important source of income to self-governed cities, such as Albi, in Provence, in the 14<sup>th</sup> century<sup>92</sup>. In the south-west of France, in Agen, from 1218, some notaries also exercised the voluntary jurisdiction<sup>93</sup>. In Italy, in Genova, during the beginning of the second half of 12<sup>th</sup> century, Giovanni Scriba (c.1154-1164), notary of the commune also assured the voluntary jurisdiction<sup>94</sup>.

But it was rarer than in the north of Europe because the public writers did not depend on the urban authority and they authenticated the acts of the voluntary jurisdiction with their *signum*, a personal and unique signature and not with the urban seal<sup>95</sup>. By exception, the most important cities required all notaries acting in the city to seal acts of voluntary jurisdiction to ensure the *publica fides comunis*, for example, in Arles and Avignon, in the south of France, from 1230's<sup>96</sup>. Afterwards, the king of France failed to impose the seal in southern France, especially in Provence, and recognized the validity of notarized acts simply signed by the *scriptor*, in 1304<sup>97</sup>.

Conversely, in southern Italy, where feudal power was strong, these acts of voluntary jurisdiction, even in some cities, had to be sealed by the count's administration or one of his officers who represented him to be considered legally valid<sup>98</sup>. The valley of Aoste, in the north of Italy, was in the same situation<sup>99</sup>. Likewise, in Orléans, near Paris, since the creation of the notaries of the Chatelet of Orléans in 1302, these acts of voluntary jurisdiction were to

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pro sigillo cereo IIII. denarios, et non amplius (...)», art. 98, TEULET (1863), p. 263, French translation «(...) Si quelqu'un prend volontairement des lettres marquées du sceau de la ville, il donnera six deniers pour les lettres et quatre deniers pour le sceau de la cité (...)», art. 98, GERMAIN (1851), p. 113.

92 BIGET (2000), pp. 70-71.

93 «(...) testes: Helias, prior de san Crabari, Hugues de Rouinha, R. de Lato, Guilabert Odet, S. de Castel, S. de la Videa, P. de Lomanha, Doat de Labesque, W. de Lagleiza, comunis natarius Aginni, qui hanc cartam scriptsit utriusque assens, anno ab incarnatione domini. A. Aginni episcopo et domine», MAGEN, THOLIN (1876), p. 235.

94 ABULAFIA (2005), p. 17.

95 ROUMY (2009), pp. 127-131.

96 BALOSSINO (2008), p. 219.

97 «Omninum tabellionum, seu notariorum nomina et signa in curia nostra volumus registrari, et registra fideliter custodiari, et etima in qualibet senescallia, apud curiam ipsius senescalliae notariorum nomina et signa ibi registrata teneri, ne de ipsius, vel eorum autoritate possit dubitatio suboriri», art. 18, DE LAURIÈRE (1723), p. 419.

98 GILLI (2005), p. 105.

99 *Ibidem*.



be brought to the Chatelet of Orléans to be sealed with the seal of provost of Orléans, king's officer<sup>100</sup>.

The voluntary jurisdiction was originally a source of incomes for the town clerk. It was for instance the case in Dijon, in the east of France, in Burgundy, from 1169 at least<sup>101</sup>. But the payment of wages to the town clerk took away this source of profit for instance from 1197<sup>102</sup>. In the south-west of France, in Dax, in the 14<sup>th</sup> century, the town clerk called *escrivan jurad* had to seal all the letters of the city<sup>103</sup>. If the letters were a private correspondence, the town clerk was paid but if the letters were part of the diplomatic correspondence of the city he was not; the city considered that this was included in its functions for which he already received wages<sup>104</sup>. In the same way, in Abbeville, in the north of France, in 1389, the town clerk did not have to make the bourgeois pay the voluntary jurisdiction<sup>105</sup>.

These financial resources interested to the royal authorities, so the king of France sought to appropriate these profits, especially in the cities of the north of France<sup>106</sup> during the 13<sup>th</sup> century. He did the same in the cities of west of France. For instance, the city of La Rochelle lost the monopoly of voluntary jurisdiction<sup>107</sup>. Indeed, in 1276, the king of France established in a royal court of voluntary jurisdiction with his own royal notaries<sup>108</sup>. He did the same thing

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100 GARSONNIN (1920), pp. 32-34.

101 GARNIER (1867), p. 393.

102 «Que doresnavant, la esliccon du clerc de la maierie sera faite par le maire et les eschevins, et que le profit du clerc donnoit et avoit accoustumé donner, ou ce qui sera adivisé qui ce sera donné à cause dudit office et pour le scel aux causes appartenant à ladite ville, etcherra en recepte au profit d'icelle et non mie du maieur, et seront expousées ces chouses à ceulx qui seront maieurs ou temps advenant», CHAUME (1954), p. 91.

103 «Establit es que de tote letre pendent qui sera sagelade deu sagel de la uile, qui sie [dade] per la uile ad ougun, que sie enregistrede per lescruan jurad en lo paper de la uile, e per lo registrar aqued qui le leire bora, que pagi y a lescruan tres bons morl. Empero si le dite letre ere dade per lo profeyt de la uile ensem, que per aquere registrar lescruan no prengos», ABBADIE (1902), p. 521.

104 *Ibidem*.

105 «Et puis che, sera tenus de escripre, à toutes les personnes qui deveront avoir seedules de le ville, leurs seedules pour nyent et sans pour che prendre ne avoir aucun salaire et ossi les enregistrer en un papier», THIERRY (1870), p. 184.

106 ROUMY (2009), pp. 141-144.

107 DELAFOSSE (2002), p. 26.

108 *Ibidem*.

in Montpellier, in the south of France, during the 14<sup>th</sup> century<sup>109</sup>. The king of England did the same thing in Bordeaux always in the 14<sup>th</sup> century<sup>110</sup>. In Laon, in the north of France, since 1284, the royal officers affixed the seal of the king to the commercial charters which compelled the commune compelled to reduce significantly the number of its notaries<sup>111</sup>.

The urban voluntary jurisdiction was born at the same time as the authentication of the charters of self-governed cities. But the voluntary jurisdiction specialized and gained autonomy only in the 13<sup>th</sup> century. However, from the end of the same 13<sup>th</sup> century, the royal authority disputed to the cities this voluntary jurisdiction at the expense of urban finances. The great seal of the city, dedicated to the public charters, had a greater longevity. The self-governed cities engraved their power on their seal.

### 3. *Sigillography and urban iconography*

The main representation of the executive power of a self-governed city was the iconography which was engrave on the seal of the city. For example, in Saint-Quentin, in the north of France, during the 14<sup>th</sup> century, the communal seal represented the executive power. Indeed, the mayor on horseback surrounded by two jurors were engraved on the urban seal<sup>112</sup>. In the south of France, the urban power was also represented on the seals, for instance, that one of the consulate of Nîmes<sup>113</sup>, in 1226, figured the magistrates of the city from head to foot in bourgeois dress<sup>114</sup>. The representation of the deliberative body was rare<sup>115</sup>.

The seal could still represent not the executive or deliberative power, but a symbol or a figure of communal power such as the urban bells, in the south of France, in Cahors, Rodez and Saint-Girons or the belfry in the north-west of France in Soissons and in Meaux, in Tournai, in Belgium and in Ypres, in Flanders<sup>116</sup>.

The inscription on the seal was equally interesting. In 1187, the seal of Ypres mentioned both the aldermen and the bourgeois of the city that is to

109 BAUMEL (1971), p. 163 and GOURON, HILAIRE (1958), pp. 3-39.

110 RENOARD (1965), p. 442.

111 SAINT-DENIS (1994), p. 492.

112 DE SARS (1936), p. 41.

113 COCHIN (1873), p. 685, fig. 4.

114 DEMAY (1880), p. 246.

115 DEMAY (1880), p. 139.

116 CHASSEL, FLANDIN-BLÉTY (2011), pp. 138-139.

say the members of the commune in addition to the executive power<sup>117</sup>. In the south-west of France, the seal of Figeac, mentioned the council, *sigillum communis consilii de Figiaco*, in 1232<sup>118</sup> while Rodez mentioned only the consular executive, *sigillum consulatus civitatis Ruthene*, in 1389<sup>119</sup>. In other cities the inscription could not indicate anything other than the name of the city, such as in Saint-Omer, in the north of the country, in the 12<sup>th</sup> century: *hec est figura sancti Audomari*<sup>120</sup>.

The evolution of the iconography also indicated the evolution of political power relations in the city. For instance, again in Saint-Omer, in the north of France, in the 13<sup>th</sup> century the mayors of the previous century disappeared from the urban seal to the benefit of council members,, because of an oligarchic evolution of communal power<sup>121</sup>.

Sometimes, the seal did not represent urban power. For instance, in the south of France, on the seal of Millau was represented Alfonse II, called the Chaste of the Troubadour (1157-1196), king of Aragon<sup>122</sup> who conceded the consulate in 1187<sup>123</sup>. In this case, the urban seal represented the grantor of urban freedoms and symbolized a still strong link between the king and his city<sup>124</sup>. Later, in the first decades of the XIII century, this model was taken over by Brignoles and Tarascon<sup>125</sup>.

On the contrary, in the 13<sup>th</sup> century, the seal of Toulouse, in the south of France, represented on one face the emblem of the city and on the other face the cross of Toulouse, emblem of the count of Toulouse.<sup>126</sup> It was thus a reminder of the granting authority, the city of Toulouse being more self-governed than Millau, in the south of France, during the 13<sup>th</sup> century<sup>127</sup>. At least, some cities like Beziers, in Languedoc, were forced by the feudal power to represent their lord on the urban seal<sup>128</sup>.

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117 VANDENPEERENBOOM (1880), p. 316.

118 CHASSEL, FLANDIN-BLÉTY (2011), pp. 144-145.

119 CHASSEL, FLANDIN-BLÉTY (2011), p. 149.

120 CHASSEL, FLANDIN-BLÉTY (2011), p. 156

121 CHASSEL, FLANDIN-BLÉTY (2011), pp. 140-141.

122 DE FRAMONT (1989), pp. 89-90.

123 BERNARD (1938), p. 89.

124 DE FRAMONT (1989), p. 88.

125 DE FRAMONT (1989), p. 100.

126 DE FRAMONT (1989), p. 99.

127 *Ibidem*.

128 CHASSEL, FLANDIN-BLÉTY (2011), p. 140.

Occasionally, it was not the local power that was represented. For instance, Beauvais, in the north of France, had bells on its seal<sup>129</sup>, thus reminding the antiquity of the episcopal aspect of the city and the fact that the city received the authorization to become a commune, in 1096 by Ancel, the bishop of Beauvais (1096-1099)<sup>130</sup>. In Beaumont-sur-Oise, near Paris, the battlements of the city were engraved on the seal<sup>131</sup>. In La Rochelle, in the west of France, the seal had a ship, thus reminding the sea commercial activity of the city, in the same way as, like Bayonne, in the south-west of France, with whaling<sup>132</sup>. In others seals the bourgeois militia was figured, for instance, in Compiègne<sup>133</sup> and in Fismes, in the north-east of Paris<sup>134</sup>. Symbolically still, the city could engrave its coat of arms<sup>135</sup> or represent the patron saint of the city, for instance, Saint-Victor, in Marseille, in Provence, in the south of France and Saint-Étienne in Metz, in Lorraine, in the east of France<sup>136</sup>.

More rarely for the cities, animals were sometimes engraved on the seals. For instance, in Agen, in the south-west of France, the seal had an eagle<sup>137</sup>. In Crépy-en-Valois, near Paris, it was a salamander<sup>138</sup> and in Cerny-en-Laonnois, in the north of Paris it was a deer<sup>139</sup>, but it was some rats, in Arras, in the north of France<sup>140</sup>.

The seal represented and mentioned the local authorities of the city, whether they were lords, kings or bourgeois. However, it was not a monopoly, since the seals could depict a more figurative iconography like battlements, militia or a great diversity of real or fantastic animals. So, the iconography of seals informs us about the image that the urban power wished to send back from its self-governed city.

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129 BOONE, LECUPPRE-DESJARDIN (2011), p. 119.

130 DESPORTES (1988).

131 METMAN (1968a), p. 29.

132 CHASSEL, FLANDIN-BLÉTY (2011), p. 138.

133 METMAN (1968a), p. 28.

134 METMAN (1968a), p. 29.

135 CHASSEL, FLANDIN-BLÉTY (2011), p. 137.

136 *Ibidem*.

137 METMAN (1968b), p. 67.

138 METMAN (1968a), p. 29.

139 *Ibidem*.

140 CHASSEL, FLANDIN-BLÉTY (2011), p. 138.

#### 4. *Conclusion*

The study of the seals is essential to the study of the medieval cities. Sigillography is needed more particularly in the history of law. The seal is a historical marker of legal power, but it is not the only marker and is not enough in itself to determine the degree of autonomy of a city. Though, the seal is part of a set of clues that tell us about urban autonomy as such it should not be neglected. The diversity of figurative images it contains is the main visual testimony of urban power and its magistrates.

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TYPOGRAPHIC ART AND ROMAN LAW:  
A RENAISSANCE IMAGE OF THE *LEX XII TABULARUM*

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1. *The Odofredus's Lecturae super Digesto novo: an analysis of a title page*

It is well known to what extent law has inspired all pictorial. In this paper we will analyze how historical and legal elements have been represented through an image of a title page. Below we will try to undertake an exercise of 'access' to the text, through the 'thresholds'<sup>1</sup>, on the title page of the volume *in folio* of Odofredus *Lecturae super Digesto Novo*, printed in Lyon in 1552. Having applied myself to various manuscript traditions of a fragment of Justinian's Digest<sup>2</sup>, I have recently focused on the volumes of *Digestum novum* present in libraries and archives in Naples related to the tradition. During the reading I was captured in particular from the picture on the title page<sup>3</sup> (image 1).

In this volume the picture frames the 'thresholds', such as author name, Odofredus<sup>4</sup>, the title of the work: «*Inter Ivreconsul. facilè primi, elaboratæ Prælectiones in postremum Pandectarum Iustiniani Tomum, uulgò Digestum nouum, nunc primùm in lucem emissæ*»<sup>5</sup>. Like a supplement, it follows a short epistle to the reader with comments on the significance of the work: «*Tibi igitur applaude fortunatissime lector, &viue foelix, quòd necquicquam his temporibus defiderare pofsis, quò ius antea obfcurum, nūc in apertifsi-*

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1 We can mention the important monograph of GENETTE (1987).

2 I studied the manuscripts of *Digestum novum* which include the fragment D. 41.3.4.28[29] (Paul. 54 *ad ed.*) in TUCCILLO (2016), pp. 1219 ss.

3 About the importance of the title page in the editorial peritext see: BARBIER (2004), pp. 172 s.; moreover, PALUMBO (2012). She dedicates herself important pages to the press copies of XVI, XVII and XVIII centuries (about religious, political, historical and scientific themes). It is interesting in the field of studies on legal publishing in Italy of the modern age FALLETTA's paper (at the final Conference of the project ENBaCH, European Network for Baroque Cultural Heritage) on *L'editoria*.

4 About Odofredus see: VON SAVIGNY (1850), pp. 356 ss. and p. 369; TAMASSIA (1894), pp. 5 ss.; LANGE (1997), pp. 323 ss.; JAKOBS (2001), pp. 271 ss.; DE LOS MOZOS (2004), pp. 439 ss.; SPAGNESI (2013), pp. 1450 ss.

5 ODOFREDUS (1552).

*mam erectum sit confontantiam, &quafi venienti ultro offeratur*». Place, Lugduni (with the indication *Cum priuilegio*) and year of printing, 1552, appear below.

One detail in the analysis of this title page should be immediately highlighted: the author's name, a few words of the title, *Digestum Novum*, place and year of publication, are printed with red font, color that at the same time embellishes the page and drives the attention of the reader to the key elements of the editorial peritext precisely. The name of the publisher is not on the title page, and cannot be deduced from the printer's mark as it is missing. However, the uncertainty can be overcome by comparing this title page with one of the volume *Consilia*<sup>6</sup> of the jurist Lodovico Pontano [Romano]<sup>7</sup>. The image of the front page was used on different volumes, as it was common practice among publishers. Therefore the image of the title page of Odofredus volume appears three years later, in 1555, for this volume of Lodovico Pontano, printed in Lyon by Compagnie des libraires<sup>8</sup> (image 2).

The use of the same image can be clearly deduce from the typographic mark on the title page: a rampant lion. Therefore the publisher of *Digestum nouum* was the Compagnie des libraires de Lyon and the printer, which results from the colophon (226 r)<sup>9</sup>, Guido Blasius (*Guido excudebat Blasius*).

Let us analyze the description of the illustration that surrounds the writing of the *Digestum nouum* volume. The frame is a classic *templum* – perhaps a metaphor of the Digest of Justinian, defined by the emperor himself in the *Constitutio Tanta* as *sanctissimum templum iustitiae* – surmounted at the center by the Justice shrouded in nimbus and at either side by the Pope and the Emperor. Twelve men are depicted in the base, two figures of emperors appear depicted on the pedestal of the four columns that hold up the temple. The base of the *templum*, as just mentioned, is made up of twelve men sitting in a semicircle.

According to a well-defined iconographic type, all elderly characters are depicted, with long beard and hair, and concentrated expression, symbolizing the embodiment of knowledge, representing the *lex*. Starting from the right

6 PONTANO (1555).

7 See recently: WOELKI (2011), *Lodovico Pontano*; TREGGIARI (2013), pp. 1615 ss.

8 VINGTRINIER (1894); AUDRIER (1908); DUREAU-LAPEYSSONNIE (1969), pp. 5 ss.; ROUDIE, DESGRAVES (1969), pp. 65 ss.; MARTIN (1972); DAVIS (1982), pp. 255 ss.; VARRY (2006), pp. 19 ss., especially pp. 229 ss.

9 VON SAVIGNY (1850), p. 369, has indicated the printer present in the colophon. Some information about this printer are in DAVIS (1892), pp. 272 s.

(looking at the image) we can see two groups of three men who talk to each other and hold a *tabula* either in their hands or under their arms, except for two men who have both hands free; then two more, also with a *tabula* under their arms conversing and a final group of four wise men in conversation. Only ten men carry the *tabulae*; perhaps the editorial intent was to recall the first ten tables that, as we read in Livy, are the source of all public and private law, *fons omnis publici privatique iuris*<sup>10</sup>.

All the details appear as used consistently with their semantic weight according to predetermined categories, including posture and physiognomic processing, even though the position of the wise men is asymmetric: at either side of the two groups of three men, there are a group of two and one group of four men, respectively. Below the image there is the explanatory statement: «*leges dvodecin tab.*». The four columns represent the outer limits of the ideal frame. Their stem is covered vertically by identical, narrow, beveled grooves that appear semi-cylindrical; the stem is topped by a richly decorated corinthian capital. The two front capitals serve as the basis of an architrave, from which foliage, laurel and oak, flowers hang, as well as ears of wheat, symbol of prosperity. In the upper part of the stem of the columns, there are two winged cherubs, one on each side, intermediaries between the human and the divine spheres; at the base of the columns two angels stretched upwards, grip the columns. At the height of the pedestal of the columns two men, one on either side, wrapped in ample tunics looking senile, with flowing beard.

The man on the right (facing the image), with a crown of laurel leaves on the head, typical of the emperors ornament, wears a dress with buttons and seems aiming to reads a volume keeping it with his left hand (it could be Theodosius II, Christian Emperor, author of the first Roman official codification, the *Codex Theodosianus*). The man on the opposite side, also with a laurel crown on his head and therefore an emperor, seems to have a roll in his left hand and three volumes in his right hand. We might assume that it represents Justinian with the three volumes of the *Corpus iuris civilis* and the *Novellae constitutiones* in his left hand.

An *imago iustitiae* is placed at the top, most evidently at the center of the *templum*: in a solemn and dignified posture, dressed in a tunic. In her right hand a sword, held as a sign, as static and vertical shield, drawn but not

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<sup>10</sup> Liv. 3.34.6. Read Dion. Hal. 10.3.4. About public law in XII *tabularum* see: GUARINO (1988), pp. 323 ss.; CASCIONE (2000), pp. 187 ss., especially p. 192 s.; CALORE (2017), pp. 1 ss.



wielded, metaphor of *potestas*. In her left hand a pair of Greek scales, straight in the middle of the yoke with a pivot, and two side plates. This is the typical allegory, of the medieval and modern ages, to show fairness, «the quintessential of commutative justice and equal exchange»<sup>11</sup>. She is blindfold, shrouded in cloud, sitting, perhaps indicating the transcendent and divine sphere. To the right of the Justice there is a man still seated, with a long robe, a tunic and boots, characterized by a set of *regalia*, symbols of power: the globe surmounted by the cross in his left hand, a sword, a symbol of the temporal power, in his right hand.

As a perfect companion to the temporal power is the spiritual power on the left, represented by a seated man, covered with a long robe, with the tiara and a symbolic stick which the pope brings in the right hand, just as in the medieval representations of the church, illustrated according to the iconography of the bishop of Rome. The two men wear suits that we could define more modern compared to the twelve men and the emperors, who are instead characterized by ornaments of the ancient Roman world. Three cherubs, two seated on each side of the Justice and one below her, hold the drape falling between the columns and brings the title of the work, the city and the year of publication.

A small notation must be made before attempting an interpretation of the title page also in legal terms. Only in the volume *Lecturae super Digesto novo* appears the described picture. The *Lecturae super Digesto veteri* and *Lecturae super Infortiato* published in Lyon with the Compagnie des Libraires, have been marked with the same image on the title page, but a different image than the one of *Lecturae super Digesto novo*.

It is interesting to note how the depiction is much less detailed and extensive than that of *Digestum novum*. Two cherubs at the top on both sides, in a frame at the middle a man with the globe surmounted by the cross in his left hand and a sword in his right hand; seated on each of his sides two groups of four men with long tunic and hat. The columns on the side lines delimit the frame while below it's visible the printing brand: two lions holding a crest.

The *Lecturae* represent a work destined to an elite, addressed to an audience eager to see, as well as to learn; it is likely that in the volume of *Digestum novum* the iconographic sets, the details, spatial references, decorative motifs, the most sophisticated, enriched in particulars, represent the result of an evolution, of a refinement of editorial technique.

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<sup>11</sup> In this terms: SBRICCOLI (2003), p. 61.



## 2. The access to the text through the image: an attempt of interpretation

Let's go back to the *Lecturae super Digesto novo*: the image of the title page contains an enigma for the reader, is it an editorial message or is there a link between the editorial peritext and the text?

We know that Odofredus believed to have seen in Lateran, during a trip to Rome in 1236, two ancient tables belonging to the *leges XII tabularum* «*et de istis duabus tabulis aliquid est apud Lateranum Romae*»<sup>12</sup>; but historiography<sup>13</sup> shares the view that Odofredus confused the *lex de imperio Vespasiani* with the last two *tabulae* of the *leges XII tabularum*. As for the number of depicted men it is notorious the strong significance of the number twelve, coupled with a circular concept corresponding to the twelve constellations that the precession of the equinoxes meets in his gait, the twelve Olympic Gods, the twelve lictors, the twelve apostles during the last supper, in which the biblical themes of betrayal of Judas and the institution of the Eucharist interwine, the twelve wise men in the conference, the twelve knights of higher rank surrounding King Arthur, legendary king of the Britons in the chivalric medieval poetry. Obviously the Twelve Tables.

But let's try to interpret the image reproduced on the title page as a whole: the metaphor of the legislative monuments of Roman history appears evident. This is no coincidental choice of the *templum* as a base, with the depiction of the twelve men, symbolizing precisely the Twelve Tables, a unique example in the Roman legal system, extolled and celebrated as a fundamental pillar of the *ius civile*<sup>14</sup>.

The image is made even more significant by the representation of the two men who seem to symbolize the emperors: Theodosius is likely to be the one on the right, he was responsible for the *Codex Theodosianus*, a text of great importance – as it is well known – in the French area during the Renaissance; Justinian on the left. Thanks to his *Digesta*, the treasury of the Roman legal wisdom has been preserved and passed on to posterity, it became the basis of

12 ODOFREDUS (1550), p. 7v.

13 On this point see: SORDI (1971), p. 310 nt. 15; PURPURA (1999), pp. 274 s.; BRUUN (2009), p. 31 and nt. 27; BUONOCORE (2009), pp. 67 s. and nt. 68; BORIAUD (2009), pp. 118 s.

14 Starting from Gothofredus a lot of scholars tried a palingenesis of the *XII tabularum* text: GOTHOFREDUS (1616-1617); DIRKSEN (1824); SCHOELL (1866); VOIGT (1883); DILIBERTO (1992a); DILIBERTO (1992b), pp. 229 ss.; DILIBERTO (2002), pp. 447 ss.; DILIBERTO (2005a), pp. 83 ss.; DILIBERTO (2005b), pp. 217 ss.; DILIBERTO (2005c), pp. 481 ss.; DILIBERTO (2009a), pp. 9 ss.; DILIBERTO (2009b), pp. 119 ss.; DILIBERTO (2012); FERRARY (2005), pp. 503 ss.

ius of all civilized people. Finally the two men at the top, located respectively on the right (the pope), and on the left (the emperor) of the *imago iustitiae* overlooking the *templum*, represent the contemporary law makers. Trying to do an exercise of access to the text through the editorial peritext, it can immediately be said that in the first volume of his *Lecturae super Digesto veteri*<sup>15</sup> Odofredus devotes a long passage to the history of decemvirates that would have drawn ten *tabulae* (... *unde ordinaverunt decem viris qui irent ad grecias civitates pro lege. Qui iverunt et portaverunt x tabulas eboreas scriptas de legibus*)<sup>16</sup>, but being these inadequate (*non sufficebant*), the following year, «*miserunt eis duos alios ut portarent adhuc duas tabulas*»<sup>17</sup>, hence were called *leges XII tabularum*<sup>18</sup>. The classical jurisprudential matrix is clearly linked to the tradition of Pomponius<sup>19</sup> in the story of Odofredus, both for the specific reference to ivory tables<sup>20</sup>, and for the information about the addition of other *duae tabulae*<sup>21</sup>.

In the third part of the renown medieval tricotomy, the *Digestum Novum*, (*Digestum vetus* comprising 1-24.2 books; *Infortiatum* with 24.3-38 books; and *Novum* with 39-50 books)<sup>22</sup>, splitting the Justinian text, the reference to the twelve tables is present in twenty-three passages<sup>23</sup>, in eighteen of them

15 ODOFREDUS (1550), p. 7v.

16 ODOFREDUS (1550), p. 7v.

17 ODOFREDUS (1550), p. 7v.

18 ODOFREDUS (1550), p. 7v.

19 D. 1.2.2.4 (Pomp. *lib. sing. ench.*): «(...) sequenti anno alias duas ad easdem tabulas adiecerunt».

20 D. 1.2.2.4 (Pomp. *lib. sing. ench.*): «Postea ne diutius hoc fieret, placuit publica auctoritate decem constitui viros, per quos peterentur leges a graecis civitatibus et civitas fundaretur legibus: quas in tabulas eboreas perscriptas pro rostris composuerunt (...)». About Pomponius's fragment and three texts of bizantine tradition connected with the fragment of Pomponius (sch. Διοδεδέλετος a Theoph. 1.15 pr.; Epit. leg. *praef.*; sch. Ἀνδρῶν a Synops. Bas. 1) and about the discussed problem of the material on which they were published the *leges XII tabularum* see: MARAGNO (2012), pp. 227 ss.

21 See Dion. Hal. 10.60.5; Liv. 3.37.4: « (...) iam et processerat pars maior anni et duae tabulae legum ad prioris anni decem tabulas erant adiectae (...)»; Cic. *de leg.* 3.19.44: « (...) tum leges praeclarissimae de duodecim tabulis tralatae duae, quarum altera privilegia tollit, altera de capite civis rogari nisi maximo comitiatu vetat».

22 At least compare RADDING, CIARALLI (2006), pp. 35 ss.

23 D. 40.7.21 pr. (Pomp. 7 *ex Plaut.*); D. 40.7.25 (Mod. 9 *diff.*); D. 40.7.29.1 (Pomp. 18 *ad Q. Muc.*); D. 41.1.7.10 (Gai. 2 *rer. cott.*); D. 41.3.33 pr. (Iul. 44 *dig.*); D. 43.8.5 (Paul. 16 *ad Sab.*); D. 43.27.1.8 (Ulp. 71 *ad ed.*); D. 43.27.2 (Pomp. 34 *ad Sab.*); D. 44.7.56 (Pomp.

the syntagm *lex duodecim tabularum* is remarked, while just in one text we can read *leges duodecim tabularum*<sup>24</sup>.

It is a fragment of Modestinus on the possibility of *venum dare* the *statu liberi*<sup>25</sup>. The peculiarity of the passage, taken from *liber differentiarum*, is the unusual purpose of the plural to indicate the XII tables, namely *leges duodecim tabularum*, accompanied by a verb *putaverunt*, is very common with reference to the jurists<sup>26</sup>, to *ius controversum* and instead it is an hapax legomenon in the combination with *lex* in the *Digesta*<sup>27</sup>.

Leaving aside the analysis of the text, of questionable authenticity<sup>28</sup>, it seems interesting to point out, the verbalization of the XII tables, an almost figurative image of them. The personification of an abstract entity and the use of an elaborate symbolism, allows us to identify a subtle connection between the editorial peritext, also used in other volumes published by the same publisher in the fifties of the sixteenth century, and the same text. Therefore the image of the Odofredus volume, with the base of the *templum* represented by twelve men, a metaphor of the XII tables, does not act as a mere ornament, but it represents a 'sort of entry to the text', which could be considered somehow correct under the profile of current knowledge of romanistic science.

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20 *ad Q. Muc.*); D. 46.3.98.8 (Paul. 15 *quaest.*); D. 47.2.55.2 (Gai. 13 *ad ed. prov.*); D. 47.3.1 pr. (Ulp. 37 *ad ed.*); D. 47.6.5 (Marcell. 8 *dig.*); D. 47.7.1 (Paul. 9 *ad Sab.*); D. 47.7.11 (Paul. 22 *ad ed.*); D. 48.4.3 (Marcian. 14 *inst.*); D. 50.16.62 (Gai. 26 *ad ed. prov.*); D. 50.16.80 (Paul. 9 *ad Plaut.*); D. 50.16.120 (Pomp. 5 *ad Q. Muc.*); D. 50.16.130 (Ulp. 2 *ad leg. Iul. et Pap.*); D. 50.16.162 pr. (Pomp. 2 *ad Sab.*); D. 50.16.195.1 (Ulp. 46 *ad ed.*); D. 50.16.220 pr. (Call. 2 *quaest.*).

24 D. 40.7.25 (Mod. 9 *diff.*): « (...) statuliberos venum dari posse leges duodecim tabularum putaverunt: duris autem condicionibus in venditione minime onerandi sunt, veluti ne intra loca serviant neve umquam manumittantur».

25 On this subject see: DONATUTI (1940), pp. 136 ss.; IMPALLOMENI (1963), pp. 19 s.; WILIŃSKI (1974-1975), p. 327; SICARI (1996), pp. 104 ss.; VIARO (2011), pp. 201 s.

26 We can compare under the term «*puto*», in *VIR.* IV.1, pp. 1354 s., the numerous texts in which *putant* is used in referring to the jurists.

27 For AVENARIUS (2005), p. 184 and nt. 44, *lex* is connected with *putat*, as in the text of Modestinus and in a text of Cicero (*de rep.* 4.8), but it does not fully correspond to the legislative function.

28 IMPALLOMENI (1963), p. 19.

Image 1



Image 2



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## Chapter II

### Representation of Justice in Music Culture



“OH, THE LAW IS RUINATION, AND ATTORNEYS ARE VEXATION ...”.  
LAW AND LAWYERS IN THE OPERA AND OPERETTA

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1. *Introduction*

This article aims to show an impact of law and lawyers on the world of opera and operetta. We certainly associate the law with books and written word; we may associate it with a world of the theatre: after all, court halls can be seen as a stage, where solicitors and prosecutors play their roles. What about music? That sphere of a cultural activity seems to be far distanced from legal issues, unless we speak about copyright matters; however, as I will try to demonstrate, it is possible to find numerous references to law and its practitioners in the area of music, specifically in the opera and operetta.

Lawyers played a vital role in European societies since Middle Ages. Commonly known for their distinctive appearance (robes, glasses, sophisticated hats), impenetrable knowledge and way of life, spent amid books and papers, law practitioners were ideal to be depicted on the scenes of theatres, especially in ironic or grotesque roles (e.g. in Molière's *Le Malade imaginaire*). Creation and bloom of the opera in ages of Baroque and Classicism (17<sup>th</sup>-18<sup>th</sup> centuries) obviously introduced lawyers on the stages of musical theaters, especially since abandoning mythological and allegoric topics for more contemporary and less serious subjects (opera buffa) exactly in the 18<sup>th</sup> century.

The paper will therefore try to show the way of perceiving law and lawyers in the culture and its evolution throughout the 18<sup>th</sup>-19<sup>th</sup> centuries, according to certain examples from the opera, ranging from Mozart and Italian opera to exotic *Madame Butterfly*. That genre gives a particularly wide possibilities to show an attitude to legal profession and its understanding in society. Not accidentally opera was sometimes perceived as a *Gesamtkunstwerk*<sup>1</sup> at that time; joining text, vision and music created a possibility to depict humans' life as complex, as never before.

Bloom of the opera was accompanied by a birth and heyday of its 'light'

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1 Especially Richard Wagner perceived opera as a way to unify music and drama: WAGNER (1852).

sister, which sometimes also took inspirations from legal matters, i.e. the operetta. I will concentrate particularly on the two hits by Johann Strauss, *Der Fledermaus* (The Bat) and *Der Zigeunerbaron* (The Gypsy Baron). Although popular around the whole globe, they are definitely not seen – as it shall be demonstrated, erroneously – as ‘legal dramas’.

## 2. *Don Bartolo, anti-hero by Mozart*

The first operatic masterpiece, which immortalised a lawyer, is without a doubt Mozart’s *La Nozze di Figaro* (The Marriage of Figaro), where a rather mocking version of a *iuris prudens* was personified by Don Bartolo: the same personage played a very similar role in Rossini’s *Il barbiere di Siviglia* (The Barber of Seville), where he was a *dottore*, but of medicine. Doctor Bartolo is obviously a comic character, rather negative, though not really ‘evil’. An old and rich man, very confident about his valors, contrasts with young, vivid, though poor couple of Figaro and Susanna, servants of Count Almaviva, just planning their wedding. As it was stated, «none could not be agree with Nicholas Till when he states that the first of the three works on Da Ponte’s librettos contains the most profound exploration of marriage as a human and social institution»<sup>2</sup>.

Their marital happiness is endangered by Bartolo, seeking for revenge after the humiliation, depicted in *Il Barbiere di Siviglia*<sup>3</sup>. He is accompanied by Marcellina, his old housekeeper; Figaro had once promised to marry her if he should default on a loan she had made to him, and she intends to enforce that promise. Bartolo decides to help Marcellina in her marital project as a legal counsel, singing a famous aria *La vendetta*, where he pleads to find any possible legal loopholes:

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<sup>2</sup> FERTONANI (2018), p. 124.

<sup>3</sup> Both famous operas, *Le nozze di Figaro* and *Il barbiere di Siviglia*, are based on dramas by Pierre Beaumarchais, depicting the life of Figaro, a clever *factotum* from Spanish Seville: respectively *La folle journée ou Le Mariage de Figaro* of 1784 and *Le Barbier de Séville* from 1775. The most popular, *Le Barbier de Séville*, was adapted by opera composers several times; apart from Giovanni Paisiello, the story was immortalised by Gioacchino Rossini, whose work remains an operatic evergreen until today. Therefore a spectator should remember that the action of the second takes place before the first one; it might be confusing, considering that Rossini composed his opera almost thirty years after that one of Mozart.

*Se tutto il codice dovessi volgere / se tutto l'indice dovessi leggere / con un equivoco / con un sinonimo / qualche garbuglio si troverà* (If I have to pore over the law books / If I have to read all the extracts, / With misunderstandings / with hocus-pocus / He'll find himself in a turmoil).

Considering the ideological sense of the opera – Don Bartolo is a symbol of old, feudal relations, but also of negative, stereotypical image of *dottore* – cynic, egoist, intriguing, immoral, although not brutal or too dangerous. In fact, he remains helpless against the young couple. However, feudal relations are mentioned also in another, more ominous version, i.e. *droit du seigneur*, which was a strongly mythicized medieval right of a landlord to bed a servant girl on her wedding night<sup>4</sup>.

Bartolo has almost attained his end; Figaro is one step away from marrying a woman old enough to be his mother, but it turns out at the last minute that she really is ... his mother! That (typically operatic) plot twist enables, after all, happy ending of all the plots with a wedding and a universal reconciliation of the heroes.

It is also noteworthy, that especially notaries did regularly play supporting roles in operas by Mozart, Rossini or Donizetti; rather depicted in a mocking way, or even only as a form of disguise, adding some spice to the intrigue, like supposed notaries in Mozart's *Così fan tutte* or Donizetti's *Don Pasquale*. Usually they appear as a necessary element of legal actions, especially marriages. However, one must remember that, in fact, in the times of Figaro (just before the French Revolution) it was impossible to form a marriage in such a way; especially in Catholic lands marriage and matrimonial law was an exclusive domain of the Church, and therefore a civil marriage was by no means possible. Even though, notaries were indeed included in matrimonial rite, i.e. they were necessary for drafting prenuptial agreements and contracts<sup>5</sup>.

However, the twilight of *opera buffa* in the first half of 19<sup>th</sup> century marked also the end of good times for legal practitioners in the opera (in dramas by Verdi or Wagner, often taking place in ancient or medieval scenes, there was not enough place for lawyers). They did not usually match serious, romantic librettos. Nevertheless, it was by no means a definite end of the lawyers' presence on musical stages.

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4 See CLASSEN (2007), p. 94 and FALETTI (2018), p. 94.

5 One of the most famous agreements of this category is a contract of marriage between Mozart and Constanze Weber; digitised by the British Library, it is now available online: [http://www.bl.uk/manuscripts/FullDisplay.aspx?ref=Zweig\\_MS\\_69](http://www.bl.uk/manuscripts/FullDisplay.aspx?ref=Zweig_MS_69).

### 3. Die Fledermaus and the role of Blind

In the late 19<sup>th</sup> century, the golden age of Viennese operetta, also in Habsburg Empire lawyers were also seen as a graceful subject for stage depictions. That also reflected changes in position and perceiving of lawyers in reformed, constitutional Austria-Hungary. For instance, since entering into the force of the Attorneys' Ordination of 1868<sup>6</sup>, their role in modern society increased and changed; they became a part of bourgeoisie and started to be perceived as a noble and respected profession.

Probably the best-known example of a Viennese *iuris prudens* in the operetta is the stuttering attorney (*Rechtsanwalt*) Blind<sup>7</sup> from J. Strauss' *Die Fledermaus*. The legal practitioner not only didn't manage to save a wealthy Viennese, *Herr* Gabriel von Eisenstein, from being sentenced to spending five days in the arrest. Moreover, after the hearing, additional three days were added as a punishment for insulting the court. Although it is not said directly we might assume that Eisenstein was found guilty of a misdemeanour regulated in § 312 of the Austrian Penal Code of 1852<sup>8</sup>, which penalised insulting public officials, servants, guards, railway employees, while they were executing their duties. The following article stated that a penalty for a simple, verbal insult was between three days to one month of arrest. Therefore, Eisenstein got the mildest possible punishment for his behaviour.

That unfortunate judgment initiates the whole intrigue of the operetta and initiates a famous trio, where furious Eisenstein repeats the title of this paper<sup>9</sup>:

*Nein, mit solchen Advokaten, ist verkauft man und verraten; da verliert man die Geduld! (...) Statt daß jetzt die Sach' beendet, hat's noch schlimmer sich gewendet, und daran ist er nur schuld!* (Oh, the law is ruination, and attorneys are vexation; I've no pa-

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6 *Rechtsanwaltsordnung*, RGBL. 96/1868; remains in force until today.

7 His name, also in German, means *blind*, what presumably was an intentional word-play.

8 *Kaiserliches Patent vom 27. Mai 1852, wodurch eine neue, durch die späteren Gesetze ergänzte, Ausgabe des Strafgesetzbuches über Verbrechen und schwere Polizei-übertretungen vom 3. September 1803, mit Aufnahme mehrerer neuer Bestimmungen, als alleiniges Strafgesetz über Verbrechen, Vergehen und Uebertretungen für den ganzen Umfang des Reiches, mit Ausnahme der Militärgränze, kundgemacht, und vom 1. September 1852 angefangen in Wirksamkeit gesetzt wird.*

9 Quotations as translated from German by KALISCH (1825).

tience. it's a shame. (...) You are guilty of collusion, you have only made confusion, and you only are to blame!).

This accusing phrase is, however, riposted by Blind, promising a glorious triumph in a higher court:

*Und ich werde Ihnen dann schon zeigen, was ich kann: rekurrieren, appellieren, reklamieren, revidieren, rezipieren, subvertieren, devolvieren, insolvidieren, protestieren, liquidieren, exzerpieren, extorquieren, arbitrieren, resumieren, exkulpieren, inkulpieren, kalkulieren, konzipieren* (I'll show you what smart attorneys / Can invent: Application – Information, Attestation – Prorogation, Subhastation – Pignoration, Vindication – Replication, Protestation – Liquidation, Condonation – Sequestration, Arbitration – Jactitation).

One can notice here an emanation of a common stereotype about lawyers, esp. attorneys: obstinate people using various strange, incomprehensible, Latin-derived words, and who never admit their failure.

Eisenstein, however, decides to go to the prison, but on the next day, as he wants to attend a great ball, organised by Prince Orlofsky. Among others, he meets there a prison director Frank, showing his 'human face' as a merry companion; in the final act of the operetta, already working, he will be suffering from a terrible hangover. All in all, even penal law and prison system is therefore shown as something not too harsh or serious. One should understand it, of course, as a caricature and kind of a comical *licentia poetica*, but it is also worth of remembering, that contemporary Austria was indeed a quite liberal 'state of law' (*Rechtstaat*)<sup>10</sup>. That enabled Strauss not only to parody state officials, but also to depict a situation as unbelievable in an absolutist police state (which Austria used to be just twenty years earlier), as careless ignoring a fact of being convicted or mocking the officials.

Attorney Blind 'appears' once more later – in the final act of Eisenstein dresses himself in robe and, imitating Blind, pretends to be giving legal advice to his own wife and her (alleged) lover, trying to get info about their presumed affair – and so, in fact, he takes use of a due trust and respect of attorneys. All in all, the whole story turns out to be only a joke; however, the final result of Blind's defence of Eisenstein is kept in secret.

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10 See DZIADZIO (2001).

#### 4. Der Zigeunerbaron: *musical and legal masterpiece*

Another masterpiece by Johann Strauss Jr., *Der Zigeunerbaron*, is based on a novel by the great Hungarian writer Mór Jókai (also a successful legal practitioner himself). The plot of the operetta is actually a great legal intrigue, including almost all branches of law. Not only a lawyer plays important role (the imperial commissar, Count Carnero), but also various legal questions are vital for the scenario. Otherwise than in *Die Fladermaus*, the action takes place in realities historical already in the moment of composing, that is in southern Hungary, namely Banat of Temesvar, during the times of Empress Maria Theresa (ca. 1743).

It is worth noticing that not only in the times in which *Der Zigeunerbaron* is set, but also in the times of Strauss, Hungarian private law was not codified; based on medieval acts, Werbőczy's *Tripartitum* of 1514 and fragmentary later codifications, it remained an exceptional labyrinth of older and newer legal sources<sup>11</sup>. Legal situation in Banat was even more complicated and its southern part remained (also judiciary) under a military control as a part of the Military Frontier until its dissolution in 1871.

Main character, Sandor Barinkay, comes back from an exile thanks to an imperial amnesty and tries to regain the possession of his family goods, assisted by Carnero, who officialy, in presence of the two witnessess, proclaims the return of the legal landowner and performs his intromission with the goods; thus the intrigue begins with a public law case<sup>12</sup>. Main part of Barinkay's land, however, is in fact ruled by Koloman Zsupan, a pig-bearer; therefore a model case of property law arises. Yet Zsupan invents a 'perfect' solution: his beautiful daughter Arsena shall marry Barinkay and so, as Sandor's (*nomen omen*) father-in-law, he would partially keep his wealth<sup>13</sup>.

For that purpose Zsupan, according to the local customs, officially introduces Barinkay to his daughter as a suitor<sup>14</sup>. However, Arsena refuses to marry him, while she secretly loves another young man (by the way, a lost son of Carnero: again a truly operatic motif). Such a conflict between fathers' will and children's emotion was common in real life of Europe until the 20<sup>th</sup> cen-

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11 See ALMÁSI (1924), pp. 4 ss.

12 LÜCK (2010), p. 481.

13 One may interpret it as a reference to the famous saying on Habsburg politics: «Bella gerant alii, tu felix Austria nube!» (Let others wage war: thou, happy Austria, marry!).

14 LÜCK (2010), pp. 482-483.



ture and was also eagerly exploited in art; above all, in the love story between Romeo and Juliet. Yet in this case the lovers' relationship, after all, finds a happy final.

Meanwhile, Barinkay falls in love with Gypsy girl, Saffi, what of course is unacceptable on both social and religious grounds. This, however, does not refrain the lovers; they sing a charming (and scandalous) duet about 'natural' basis of their relationship (*Wer uns getraut*), escaping far from the canon law view on the idea of marriage. The problem is miraculously resolved because it is discovered that Saffi is a daughter of the last Turkish *pasha* of Temesvar and therefore an aristocrat, so a proper spouse for nobleman Barinkay.

Nevertheless, Carnero declares, that the case of Barinkay and his adulterous affair will have to be resolved by the Vice Tribunal (*Sittenkommission*) in Vienna, of which Carnero is a Deputy Chairman. Under that name one should understand the Chastity Commission (*Keuschheitskommission*), known also as *Keuschheitsgericht* or *Zuchtgericht*<sup>15</sup>; created by Maria Theresa in 1752 for punishing the immorality, it tried – among the others – the famous Casanova.

Arising religious problem was passed over, although (as mentioned before) at that time it would be impossible for a Christian man to marry a Muslim woman because of a religious system of marriage law, which remained binding in Habsburg Empire until Joseph II's *Ehepatent* of 1783. Moreover, marrying an infidel without religious conversion was, in general, impossible in Austria till even 1938, when, after the *Anschluss*, German matrimonial law was imposed<sup>16</sup>, introducing an obligatory civil marriage. In Hungary analogical regulation was introduced over forty years earlier<sup>17</sup>.

As if there were not enough problems, Barinkay, helped by Gypsies, finds a legendary treasure on his land. Therefore, another legal question arises: who is the owner of the found gold? That problem was actual already in the 18<sup>th</sup> century and regulated in various imperial decrees (*Hofdekret*), taking their power from a traditional understanding of a treasure trove as a property of the monarch<sup>18</sup>. According to those regulations, as well as in the Austrian civil codification from 1811, the ABGB<sup>19</sup> (§§ 398 to 401, then repealed by the *Hofdekret* of 15 June 1846), the state was an owner of at least one third of

15 See WINKLER (2011).

16 *Gesetzblatt für das Land Österreich*, 244/1938.

17 Hungarian Act XXXI of 1894.

18 LÜCK (2010), p. 487.

19 *Allgemeines Bürgerliches Gesetzbuch*, remains in force in Austria until today.

a found treasure; any archaeologically valuable finds should have been sent to a respective museal institution. That, of course, raised many problems and strongly discouraged citizens from reporting the officials about any finds<sup>20</sup>; unfortunately for Barinkay, Carnero is present on the spot and categorically demands a handover of the treasure.

Vicissitudes mentioned above are followed by an adventure, in which *ignorantia iuris nocet* rule shows its painful veracity. When count Homonay unexpectedly arrives with his regiment of hussars, recruiting volunteers for a war in Spain, main male characters (including Barinkay and Zsupan) merrily drink wine with soldiers; yet they don't realise that drinking recruitment wine (*Werberwein*), followed by a handshake, is understood as enlisting in the military<sup>21</sup>. That custom law norm was obviously a kind of abuse; a practice of impressment – as it was called in England – meaning making potential recruits drunk to take them into the army or navy by compulsion was common in pre-revolutionary Europe, even though it was commonly seen by the contemporaries as an abuse and condemned<sup>22</sup>.

This event, however, leads to a glorious happy end – Barinkay grants his treasure for the purpose of war and, after two years, returns as a war hero and baron (*Freiherr*), finally uniting with his beloved Saffi: after all, the final of the operetta is therefore optimistic and timeless – a spectator might learn that even the biggest legal turmoil can find its solution.

So, although *Die Zigeunerbaron* does not reflect legal matters of Temeser Banat in the XVIII century too precisely, it is possible to say at least that «it artistically expresses human actions that are often linked to the legal problems within their historical spatial and temporal structure»<sup>23</sup>.

### 5. Puccini's *East and West*: *Madama Butterfly* and Gianni Schicchi

Two decades after the premiere of *Der Zigeunerbaron* another Imperial commissar was represented in a merely serious stage work: Giacomo Puccini's famous *Madama Butterfly*, a staple of the operatic repertoire around the world until today. A dominating motif of this late-romantic *verismo* masterpiece, based on a short story by John Luther Long, is the clash of European

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20 See BOKWA (2017).

21 LÜCK (2010), p. 484.

22 E.g. PIAGGINO (1799), p. 76.

23 LÜCK (2010), p. 487.

and Japanese understanding of marriage, leading to a final tragedy. Here, however, the commissar plays only a formal, short role, namely assisting in a Japanese wedding of Pinkerton, an American naval officer coming to Nagasaki in 1904, where he marries a fifteen years old geisha called Cho-Cho-San (Butterfly) for «novantanove anni». She is so excited to marry an American, that she even secretly converts to Christianity.

Pinkerton treats a whole ceremony, conducted under the rules of a new Japanese Civil Code of 1896 (*Minpō*, influenced by German law)<sup>24</sup>, rather as an exotic masquerade than an authentic wedding; Japanese divorce laws were very lax for men and, in fact, he treats his new wife as nothing but a mistress<sup>25</sup>. Butterfly, on the contrary, takes it completely serious, demanding to be addressed as «Madama F. B. Pinkerton» and declaring the United States of America as her country. In the second act of the opera we see Butterfly alone, abandoned by Pinkerton, though awaiting him for three years and rejecting with passion advances of another men arranged by marriage broker Goro, including even a wealthy prince Yamadori<sup>26</sup>.

Speaking to the American consul Sharpless, Butterfly declares herself as a ‘wife of an American’, to whom American legal norms should be applied<sup>27</sup>; although, according to a traditional Japanese custom law, she is free to marry since she has been abandoned. In that time being deserted was one of very few situations allowing a Japanese woman to formally divorce her husband. On the contrary, according to the traditional Japanese law, a man could divorce his wife by only writing a letter of his intent to do so.

One may see it as a paradox: what was supposed to be only a formality, is treated far more serious by the Japanese than by the American, for whom the ‘holiness of marriage’ should be a relatively natural thing<sup>28</sup>. Here, however, also another, tragical perspective is depicted: «Butterfly story can be seen as juxtaposing two institutions of marriage, the lifelong Christian marriage of the West, to which Cho-Cho-San adheres (though the Westerner Pinkerton does not) and the temporary marriage of Japan, used for their own purposes by Pinkerton [and] Yamadori»<sup>29</sup>.

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24 COLOMBO, SUZUKI, YOKOMIZO (2018), p. 72.

25 NELLHAUS (2017), p. 340.

26 COLOMBO, SUZUKI, YOKOMIZO (2018), p. 71.

27 *Ibidem*, p. 73.

28 See WEISBROD (1999).

29 *Ibidem*, p. 25.

That 'clash of cultures' leads to a tragedy in the final, third act of the opera. Butterfly finally meets her beloved, who comes back from America with his 'real' American wife. Devastated Butterfly commits *harakiri*; the way of suicide though commonly attached to the *samurai*, but also used by Japanese women to save their honour<sup>30</sup>. And so, contrary to merry stories from Strauss' operettas, we see an authentic tragedy, caused by cultural differences, leading to a different understanding of legal institutions by the lovers. That warning might be even more actual today, in a globalising, multi-ethnic and multi-cultural world.

Although linked mainly to serious and dramatic works, Puccini had also a comic episode, based in medieval Italy: the most popular part of his *Tritico*, i.e. *Gianni Schicchi*, basing on a timeless plot: a litigation about family heirlooms, not uncommon also in the Italian opera<sup>31</sup>. Coming back to his homeland the composer, inspired by a short mention in Dante's *Divina Comedia* (*Inferno* XXX), depicts a comical sides of human greed and hypocrisy, personalised by the family gathering around deathbed of a rich citizen of Florence, called Buoso Donati. After mourning his passing, the relatives are mainly interested in the fortune of the deceased. Their love to Buoso, however, perishes after discovering his last will in which he bequeathed his whole fortune to the monastery. Buoso took use of the classical Roman institution, the *exheredatio*, which was also common in a law of medieval Italy<sup>32</sup>.

The family seeks feverishly for a way to change or annulate the will, but this, however, seems to be impossible. It is not suprising while *favor testamenti* and freedom of testation (especially in favour of the Church) rules have already been well-founded, at least in the deeply romanised Italy. Their problem is finally resolved by a *nouveau riche*, a shrewd Gianni Schicchi, Lauretta's father, who is in love with Buoso's nephew Rinuccio. Schicchi agrees to help the disinherited, though in a decidedly illegal way; he manages to disguise himself as Buoso and dictate a new will in the presence of a notary public. To the surprise of the family, Schicchi makes use of the whole situation for himself. As an alleged Buoso Donati he bequeaths the most valuable assets to «my dear friend, Gianni Schicchi». However, the furious members of Donati family are helpless to this 'frauding of the fraud'. Schicchi blackmails them, taking advantage of his knowledge of penal law which punishes equally

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30 MOSTOW (2006), p. 190.

31 FERRERI (2018), p. 111.

32 SANZA (2018), p. 247.

the counterfeitor and his accomplices (an idea widely accepted also in present-day regulations). Therefore, the Donatis cannot denounce him and can only accept a new will.

In his final monologue Schicchi states that the only purpose of his illegal actions was to ensure the happiness of Lauretta and Rinuccio who, otherwise, probably would not be able to marry; also the victims of his trick were definitely not impeccable. Therefore, Puccini leaves the audience with an open question if Schicchi's behaviour could be somehow morally justified.

## 6. *Final remarks*

All above mentioned examples show how perceiving of the law and the lawyers influenced the world of the musical theatre. That sets an ideal example of a constant presence of legal matters even in a musical sphere, what shows their great role in a culture of (not only) European societies and their history. Derived from different traditions – from a Classicist drama to the exotic Japanese story – those various motifs illustrate a big intellectual potential of the opera and operetta, which are commonly (and erroneously) associated rather with unrealistic love stories or exaggerated drama. As it has been stated, «law often dominates on the opera stage and fascinates due to its capacity to inoculate that artist's knowledge that colors itself with juridical elements: the opera raises the curtain to the world of law and lets it venture in its own extraordinary world»<sup>33</sup>.

However, as it was proved, on the scene one may notice also lawyers and legal cases, sometimes even playing vital role for the intrigue, even if shown in a stereotypical or simplified way. Those motifs, of course, are present not because of composers' passion to law, but as a proof for omnipresence of legal matters in humans' life. Operatic art, therefore, could not disregard them and, through depiction – immortalised them. Therefore, a legal history might consider also operatic works as a *fons iuris cognoscendi*.

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33 *Ibidem*, p. 241.

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THE BOYARS, THE POET AND THE COMPOSER:  
THE PORTRAYAL OF THE BOYAR DUMA  
IN PUSHKIN'S AND MUSSORGSKY'S *BORIS GODUNOV*

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1. *Introduction: dramatis personae (and dramatis institutio)*

Boris Godunov (1552-1605) was, beyond any doubt, an intriguing historical figure. Capable, ambitious and brother-in-law to Ivan the Terrible's son Fyodor I Ivanovich (1557-1598), he rose quickly in prominence during the reign of both Tsars. As Fyodor was unskilled in governing the country (and possibly mentally disabled), prominent nobles that were his 'advisors' *de facto* ruled in his stead, simultaneously fighting among themselves for power. Having won that fight and disposed of his opponents as early as 1584, Godunov practically ruled instead of Fyodor until his death in 1598. The Tsar died without an heir: his only daughter had died in infancy and his younger brother, Dimitry, who suffered from epilepsy, died under conspicuous circumstances in 1591, supposedly accidentally killing himself with a knife during an epileptic fit. Godunov's opponents believed him to have arranged this 'accident', but his involvement was never proven and is today considered unlikely.

Having already proven himself as a highly capable administrator, Godunov was elected Tsar after Fyodor's death. He initiated many significant economic reforms, increased the diplomatic communication with the West and even planned to found an University in Moscow, but was also harsh towards some of his opponents (albeit to a far lesser extent than Ivan IV) and had the ill luck to rule during the great famine of 1601-1603. In 1604 a pretender to the throne appeared, claiming to be Tsarevich Dimitry, miraculously saved from Boris's assassins. Although the story was pure fiction, False Dimitry managed to get military aid from Poland and to gather enough supporters in Russia. As the pretender marched towards Moscow with his army, Boris suddenly died, most likely of natural causes. False Dimitry murdered Boris'

son and ascended the throne, although he was to keep it for less than a year, before his own assassination in 1606.

It is no wonder that such a controversial person as Godunov, who lived and acted during such a significant time of Russian history (known as *Smutnoe Vremya*, i.e. Time of Troubles) caused great interest of scholars and laymen alike. Many historical works have been devoted to Godunov and various aspects of his reign, both in Russia and abroad<sup>1</sup>. However, Boris's life also served as inspiration for many works of art, the most famous of which are Pushkin's play *Boris Godunov* and Mussorgsky's opera of the same name, based on the text of the play.

The aim of this paper is to analyse both works of art regarding not the persona of Godunov himself, but the representation of an institution of great importance for Russian legal history, the Duma of the Boyars (sometimes translated as Council)<sup>2</sup>. The Duma was the political assembly of medieval Russia, first the Grand Principality of Moscow and later the Tsardom of Russia. Its main competences were legislation, foreign relations, but also administration and judiciary, which it shared with the Tsar himself. Its roots reaching to the early Middle Ages, the Duma drew its strength from customary law and centuries-old tradition. Both Pushkin's play and Mussorgsky's opera feature important scenes of the Duma at work; both are artistically impressive, but how true are they to the nature of this institution and the legal reality of Godunov's time?

The word *duma* (дума) itself comes from the verb думать, *to think*, and signifies thought, pondering about something<sup>3</sup>. The Duma as an institution dates back to at least the 10<sup>th</sup> century, but, of course, it has significantly evolved over time. Originally, it was a relatively informal council of prominent people surrounding the monarch with whom he considered the best course of action in important matters. Initially, it was composed of boyars (the elite of the Prince's travelling retinue, the *druzhina*<sup>4</sup>) and city elders, but

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1 Giving a full bibliography here would be impossible, but see for example Краевский (1836); Полозовъ (1858); Павловъ (1863); GREY (1974); Скрынников (1983) (as well as other works by the same author); Павлов (1992); DUNNING (2001); Козляков (2001); Морозова (2011); Боханов (2012).

2 Originally, the organ was referred to simply as the Duma, or the Prince's Duma (later the Tsar's); the addition of "Boyar", due to its composition, is a later invention. See Ключевский (1902), p. 270.

3 Соловьевъ, Калачовъ (1855); Ключевский (1902), *ibidem*.

4 For a detailed explanation of both terms, see Пресняков (1993), pp. 181-230; Горский (1989) and especially Стефанович (2012).

the significance of the latter decreased significantly during the 11<sup>th</sup> century<sup>5</sup>. Members of the clergy (bishops and abbots of significant monasteries) also took part in the Duma from time to time, though they were never considered a part of it<sup>6</sup>. For a Prince not to consult the Duma regarding an important matter was considered strange and inappropriate<sup>7</sup>.

A circle of noble families whose members served in the Dumas of various Princes was probably already formed by end of the 12<sup>th</sup> century<sup>8</sup>. Still, most 12<sup>th</sup>-14<sup>th</sup> century sources show that not too many of them at a time (from only two to ten or little more) took part in passing decisions with the Prince, and the sessions were devoid of formalities. The acts of the Duma were mostly individual in nature, solving concrete cases and giving out orders<sup>9</sup>. Gradually, in the 15<sup>th</sup>-16<sup>th</sup> century (primarily in Moscow), as the administrative apparatus grew, everyday matters that concerned only a particular office were solved with in it; the Duma became the field where the matters of importance for all of them were to be discussed, and thus most (or at least more) of its members were summoned for every session<sup>10</sup>.

## *2. The legal and political role of the Duma in the time of the real Boris Godunov*

The reunification of the Russian lands under the crown of the Grand Principality of Moscow brought about a significant change in the very concept of the Duma of the Boyars or at least in the way they boyars perceived their own function and power. Despite its colossal political significance, the process of unification did not change all that much for individual Russian princes in their own lands. Their domains, privileges and positions were mostly neither abolished nor taken away from them, but merely subjected to the central

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5 This was due to the fact that the Prince, formerly a nomadic ruler who relied on local aristocracy of every city, gradually gained stronger footholds in the cities and appointed his own men to positions of power within them.

6 Ключевский (1902), pp. 15-50; Владимирский-Буданов (2005), pp. 64-72; Сергѣевич (2012), pp. 255-258.

7 Ключевский (1902), p. 55.

8 Whether they all also occupied concrete positions at court is uncertain: Ключевский (1902), pp. 56-57.

9 Generally, more boyars were present in the southern principalities than in the North. Ключевский (1902), pp. 62-73 and 119-155; Сергѣевич (1890), p. 377.

10 Ключевский (1902), pp. 162-172.

power of the Grand Prince, and later Tsar: the rulers in Moscow were careful not to overly disrupt the positions of their new vassals, in order to preserve their loyalty.<sup>11</sup>

However, as Klyuchevsky has skilfully pointed out, what had changed was their perception of both their own and the central power.<sup>12</sup> The monarch in Moscow was merely a new layer in the pyramid of power, and the new obligation of the boyars – to move from their lands to Moscow in order to regularly take part in the Duma – came not instead of, but in addition to the other traits of their status. But while they had previously focused only on their own domains, they were now forced to accept a broader perspective of the entirety of the Russian land; while they used to think of themselves as sovereign, hereditary lords of their own lands, they now could not but perceive that they were parts of a greater whole and that they were closely tied to others in the same position<sup>13</sup>. «From the moment of his subjection to Moscow the former local Prince was getting used to think of himself if not as an independent ruler of a certain part of the Russian land, which he had already ceased to be in reality, then as a part of a numerous class, which ruled, under the leadership of the sovereign in Moscow, the entire Russian land that was subjected to him. The tradition of power was not interrupted, but transformed: the power now became collective, belonging to an estate and pertaining to the entire land, having stopped being individual, personal and local», concludes Klyuchevsky.<sup>14</sup> While the boyars in the Dumas of centuries past were the rulers' loyal subjects and trusted advisors, those in the Duma of the reunited Muscovy saw themselves as rulers in their own right, who continued to rule with, and not merely

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11 Ключевский (1902), pp. 232-241. Naturally, not all of said vassals came under the power of the Grand Prince in the same way. See also Исаев (2004), pp. 82-84.

12 Ключевский (1902), pp. 240-243.

13 To be fair, some were not driven to a different view, but have, quite to the contrary, willingly joined the Grand Prince of Moscow for the very reason of supporting the idea of unification, which could not have taken place without some perspective of their own position in the nascent system. Cf. Ключевский (1902), pp. 245-246.

14 «Съ минуты своего подчиненія Москвѣ бывший удѣльный князь привыкалъ сознать себя если не самостоятельнымъ владѣльцемъ извѣстной части Русской земли, какимъ онъ уже пересталъ быть на дѣлѣ, то частью многочисленного класса, который подъ руководствомъ московскаго государя правилъ всей Русской землей, ему повиновавшейся. Преданіе власти не прервалось, а преобразилось: власть эта стала теперь собирательной, сословной и общеземской, переставъ быть одиночной, личной и мѣстной», Ключевский (1902), p. 242.

under, the Grand Prince, as natural and necessary intermediaries between him and the people<sup>15</sup>. Although the Duma can be considered an aristocratic organ even before this period, that aspect of its nature was greatly strengthened in this transformation.

At the turn of the 17<sup>th</sup> century the Duma also underwent significant changes in composition. Until the end of the 16<sup>th</sup> century the Duma was dominated by old boyar families; in the 17<sup>th</sup> century, the new, 'young' families that had freshly ascended the social ladder through service to the Tsar (only forming a proper class in the 16<sup>th</sup> century) were the majority.<sup>16</sup> The old aristocracy still mostly lived in reminiscences of the pre-unification times, when their ancestors ruled their family lands as little monarchs in their own right, focusing on those domains more than on the politics of Moscow. However, the *oprichnina* of Ivan IV had destroyed that state of former boyar glory. Of course, it directly destroyed many boyars as well, thus contributing to the aforementioned change in the composition of the Duma<sup>17</sup>.

Naturally, as the Duma evolved, divisions were created within it: it had special departments for various branches of government headed by individuals of various ranks (приказы)<sup>18</sup>, and *ad hoc* committees were frequently formed to complete a specific task. As the Tsar's court evolved as well, a close circle of particularly trusted people at his palace (комната) had also formed by the 16<sup>th</sup> century, though not everyone in it were boyars; in 1549, it was formalised as a closer, select council (Ближняя дума or Избранная дума) within the Duma<sup>19</sup>.

Still, plenary sessions of the Duma not only were a normal occurrence, but had just become the only regular manner of making decisions. As said, in the earlier centuries, any decision made by a Prince counselled by boyars (even if only a few were present), was considered to be a decision of the Duma. Since, from the 16<sup>th</sup> century on, boyars were required to dwell in Moscow and regularly attend the Duma, a far greater number of them was present at all times. Decisions of the Duma from that period contain the formulation *со всех бояр приговору* (by the verdict of all the boyars); naturally, that is not to be taken

15 Ключевский (1902), pp. 242-243.

16 Ключевский (1902), pp. 231 and 252-253.

17 Ключевский (1902), p. 240.

18 Although prikazi were first formed as separate organs of the court during the reign of Ivan III Vasilyevich (1440-1505), and only later subjected to the Duma. Сергеевич (1890), p. 373.

19 See Ключевский (1902), pp. 254-258; Исаев (2012), pp. 67-68.

literally (absences on various grounds were possible and frequent), but it still illustrates well that the Duma had begun working as a (more or less) harmonious whole, a proper governmental body<sup>20</sup>.

However, it was not a homogenous body. Despite the aforementioned formula, the Duma of this age was not composed solely of boyars. In the 16<sup>th</sup> century, members of two lower ranks took part in the Duma as well. The first were *окольничие*<sup>21</sup>, lesser nobles who counselled the Prince and took care of various administrative needs. They were second in rank to the boyars, but were assigned more or less the same duties<sup>22</sup>. The second were *думные дворяне*, nobles (or courtiers) of the Duma, courtiers of humbler origin, likely present since at least the time of Ivan IV, and possibly even earlier<sup>23</sup>. There was no strict rule regarding the number of members of any of the ranks in the Duma, and the relative numbers depended on the appointment policy of every individual Tsar<sup>24</sup>.

Finally, there were also *думные дьяки*, clerks of the Duma, sometimes referred to as 'secretaries of state' by foreigners. The title of *dyak* was already a widely spread denomination for a clerk (at the Tsar's court or in a *prikaz*)<sup>25</sup>, but some were specifically appointed to the Duma as new administrative needs arose. They wrote down the decisions of the Duma, provided reports and opinions from various departments. Although they were usually of low

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20 Ключевский (1902), pp. 271-272.

21 The etymology of this word is not quite clear. Karamzin believed *okolnichie* to have been those who were constantly near (около) the Prince. КАРАМЗИНЪ (1819), p. 22 (прим. 47). An alternate one was supplied by Tatischev, who linked it to the archaic word *околичность*, meaning 'duty' or 'assignment'. ТАТИЩЕВЪ (1786), pp. 8-9. Kalugin accepts and expands upon Tatischev's etymology, but also presents a broader view on this rank's duties. КАЛУГИНЪ (1855), pp. 137-153.

22 Ключевский (1902), pp. 260-261. At first, there were two duties specific to this rank: organising the monarch's travels and admitting foreign ambassadors; however, in time, members of other ranks were assigned such duties as well, making the *okolnichie* a stable second rank in the hierarchy of the nobility without strict specialisation, a convenient route for members of less prominent families to rise in rank. Сергѣевич (1890), pp. 385-392.

23 Ключевский (1902), pp. 261-266. Сергѣевич (1890), pp. 422-458. It is possible that the same class was previously known under the name *дети боярские*, 'children of the boyars', a stratum present in the Duma in the 15<sup>th</sup> century. Сергѣевич (1890), pp. 431-434; see also ИСАЕВ (2004), pp. 94 and 119-120.

24 Concrete numbers regarding Godunov's reign will be shown below.

25 Сергѣевич (1890), pp. 484-517.

rank and their job seems to have been a purely technical one, they could also affect the decisions of the Duma, both legally, by offering their opinion that would convince the boyars (they had no right of vote, but could counsel), but also illegally, by exploiting the fact that they were the ones formulating the orally proclaimed decisions in writing. Through their service, they could also attain higher ranks in the Duma<sup>26</sup>. As their primary role was a technical one, they were not too numerous. Kotoshihin, who wrote later in the 17<sup>th</sup> century, during the reign of Aleksey Mikhailovich Romanov (1629-1676), points out that there were usually three or four of them, but no more than four<sup>27</sup>.

The Duma usually worked together with the Tsar (although exceptions to this rule exist)<sup>28</sup>, and Klyuchevsky saw that fact as the reason for the fluidity of its competence. According to him, the Duma did not have a strictly determined competence because it coincided with the competence of the Tsar, who ruled with it and through it<sup>29</sup>. It is only natural for the period that the competence of such an important organ was not prescribed in detail with some written act, but determined by unwritten law, through custom and precedent. A brief regulation of its competence appeared in the *Sudebnik* (Судебник) of 1550. Its art. 98 proclaims that if new cases that are not regulated by the code itself appear in practice, the manner in which the Tsar and Duma solve them will be added to it<sup>30</sup>. But this is a mention rather than a regulation of the Duma's competence. The code neither allows nor commands the Tsar and Duma to solve such cases: it merely notes that it would be in their competence to do so, and then commands that the solutions be added to it (the *Sudebnik*) for future reference. The grounds for such competence are, still, to be found in custom and tradition<sup>31</sup>.

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26 Ключевский (1902), pp. 266-269; Сергеевич (1890), pp. 508-510 and 459-460.

27 Котошихин (1884), p. 26. By the end of the century, due to an increase in the number of *prikazi*, the number of dyaks of the Duma rose to 8. Сергеевич (1890), pp. 510-511.

28 Сергеевич (1890), p. 376.

29 Ключевский (1902), pp. 453-454. See also Сергеевич (1903), pp. 265-268 and Павлов (1992), pp. 228-229.

30 The Duma is not indicated by its name, but rather by the famous formulation «со всѣхъ бояръ приговора». See Татищев (1786), pp. 124-125.

31 Later yet, some of the Duma's competences were subsequently regulated by the *Sobornoye Ulozheniye* (Соборное уложение) of 1649. For example, chap. X, art. 2 proclaims that any judicial matters that could not be solved by the *prikazi* were to be tried by the Tsar and Duma. The Duma is again not mentioned as an individual organ; rather, the categories of its members are listed, but they are explicitly prescribed to sit and deal



Finally, it is worth noting that Peter I (1672-1725) abolished the Duma, founding a significantly different organ, the Senate, in its stead in 1711<sup>32</sup>. Thus, the Duma had gone into the realm of history over a century before Pushkin wrote his play: thus neither he nor Mussorgsky had contemporary experience with this organ to inspire them, and had to rely solely on historic sources and artistic imagination.

### 3. Pushkin's "*Boris Godunov*" and the role of the Duma in it

Alexander Sergeyevich Pushkin (1799-1837) was a poet, playwright and novelist, widely considered to be one of the greatest Russian poets (if not outright the greatest). Although he died in a duel as a relatively young man, he left behind him a rich bibliography of poetry and prose alike, ranging from lyrical to dramatic works, from fairy-tales to satire<sup>33</sup>. *Boris Godunov* was Pushkin's first play. He started writing it in December 1824, finishing in November 1825<sup>34</sup>. Two authors were his primary sources of inspiration. The idea for the play and the material for its contents were mostly gained from reading Karamzin's *History of the Russian State*<sup>35</sup>, the first major history of Russia written for a wider audience. The style of the tragedy was greatly influenced by Shakespeare's historical plays: Pushkin himself acknowledged that he had studied Shakespeare, mostly for his character-building, as he wrote *Boris*<sup>36</sup>.

Karamzin's *History* was a twelve-volume work covering the period from antiquity to 1612. He had been writing it for twenty-three years, from 1803 to his death in 1826: the twelfth tome remained unfinished<sup>37</sup>. The book completely

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with all their duties jointly, all together: «А Бояром и Окольничим и Думным людям сидети в палате, и по Государеву указу Государевы всякия дела делати всем вместе», Софроненко (1957), p. 77. See also Сергѣевич (1890), pp. 375-376. It seems that the same principle is at work here: problematic cases are to be delegated to the (already known and traditionally established) highest authorities.

32 See ИСАЕВ (2004), pp. 244-251.

33 For a good biography of the poet see, for example, ТРОЯТ (1999) or ЛОТМАН (2003), pp. 23-184.

34 ВИРОЛАЙНЕН (2008b); ГОРОДЕЦКИЙ (1969), pp. 44-51. At this time, the poet was working on two more major works, *Евгений Онегин* and *Цыганы*.

35 КАРАМЗИН (1819).

36 ПУШКИН, Борис Годунов (ред. Бетеа), pp. 95-97. See also ЛОТМАН (2008a), pp. 166-167 and Id. (2008b), pp. 175-189; ЗАХАРОВ (2014), pp. 235-249, particularly pp. 239-240.

37 See Ю. Медведев, "Послесловие", in КАРАМЗИН (2002), pp. 1016-1017.



changed the country's perception of its own past and sparked a major increase of interest in history<sup>38</sup>. Pushkin himself had called Karamzin the first historian and the last chronicler of Russia<sup>39</sup> and had devoted *Boris* to his memory<sup>40</sup>. The tenth and eleventh book of Karamzin's *History*, covering the period from the reign of Fyodor Ivanovich to that of False Dmitry had just been published in 1824: soon, Pushkin was already making notes for his upcoming play<sup>41</sup>. Relying on Karamzin's text, Pushkin presented his Boris as the murderer of the real Tsarevich, an image which will come to dominate popular culture due to his play and Mussorgsky's opera<sup>42</sup>. Still, it must be noted that Pushkin's opinion on many historical facts did not always match Karamzin's. Even Boris, despite his crime, was portrayed as a tragic figure, a monarch who had his country's best interest at heart and a loving father to his family, rather than a villain<sup>43</sup>.

The first draft of the play was finished in 1826, but published only in 1831, after some editing, due both to difficulties with the imperial censorship and the poet's own reworking of the original text. However, even after publication, it was not approved for staging, as it featured the Patriarch and monks (the latter not always in a favourable light), and it was generally not allowed to show members of the clergy on stage due to objections of the Church<sup>44</sup>. The imperial ban was finally lifted in 1866, and *Boris* was first performed in 1870, over forty-three years after the poet's death<sup>45</sup>.

The Duma is first mentioned in the second<sup>46</sup> and features in the fourteenth

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38 For more information on Karamzin as both writer and historian see ЛОТМАН (1997).

39 «Карамзин есть первый наш историк и последний летописец», Пушкин, «История русского народа», сочинение Николая Полевого. Том I., в Полное собрание сочинений, том седьмой, p. 136.

40 ПУШКИН, Борис Годунов (ред. Бетеа), devotion page (not numbered).

41 ВИРОЛАЙНЕН (2008a).

42 Many historians have also followed in Karamzin's footsteps. Ian Grey even remarked: «Indeed, both inside Russia and beyond its frontiers, Karamzin must bear special responsibility for the distorted portrayal of Boris which historians with only a few exceptions have followed until the present century», GREY (1974), p. 14. It may be worth noting that the *History* represents Karamzin's later views, and that he had initially been far more sympathetic towards Godunov: see КАРАМЗИНЪ (1819), pp. 30-47.

43 For more details see ЛОТМАН (2008b), pp. 157-168; DUNNING (2001b), pp. 51-93; ГОРОДЕЦКИЙ (1969), pp. 28-43; АГРАНОВИЧ, РАССОВСКАЯ (1992), pp. 37-41.

44 On the publication history see ГОРОДЕЦКИЙ (1969), pp. 66-83; ВИРОЛАЙНЕН (2008b).

45 EMERSON, OLDANI (2004), pp. 92-93.

46 In the scene *Красная площадь*, Schelkalov, the chief *dyak*, goes out into the square to inform the people of the decision of the Duma.

out of a total of twenty-two scenes in the final redaction of the play<sup>47</sup>. There are other scenes featuring some boyars with the Tsar, but none of them show an official assembly of the Duma. The scene is entitled *Царская дума*. It starts with the Tsar presenting the problem of the Pretender's military advances to the Duma and giving out orders to individual boyars, mentioning also that the Pretender is spreading vile rumours, without specifying their nature. He then asks for the Patriarch's counsel. The Patriarch advises him to be merciful and patient, but also explicitly states that the Pretender<sup>48</sup> shamelessly claims to be Tsarevich Dimitry. He then narrates how, in the very year when Boris was crowned Tsar, an old shepherd had told him how he had visited many holy places in hope to be cured of blindness, with no avail, but was finally addressed by the Tsarevich in a dream and instructed to pray over his grave, upon doing which he truly regained his sight. The Patriarch then suggests that the holy relics (i.e. remains) of Dimitry be transferred to Moscow in order to expose the Pretender's lies. After a moment of silence, an important boyar, Shuysky<sup>49</sup> claims that such an act might be condemned as exploiting a holy relic for worldly means and suggests it would be better for him to go out into the city square and try reasoning with the people<sup>50</sup>. Boris accepts Shuysky's plan and retreats for private counsel with the Patriarch. The boyars also leave, but not before one of them points out to the other how the Tsar grew pale and began sweating while the Patriarch talked about the dead Dimitry<sup>51</sup>.

There is no record of such a session of the Duma in historical sources. Also,

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47 In the original manuscript, this was the seventeenth of twenty-five scenes, but its contents suffered practically no changes by the time of publication. See DUNNING, EMERSON, FOMICHEV, LOTMAN, WOOD (2006), pp. 390-399. For more on the omitted scenes, see EMERSON (2006).

48 Whom he even, figuratively, qualifies as the son of a demon or evil spirit (бесовский сын) at one point.

49 The historical Vasily Shuysky was elected Tsar in 1606, after the death of False Dimitry I, only to be deposed and forcefully made a monk in 1610. He was given as a prisoner to the Poles and died in captivity soon after. For more information on his life and reign see e.g. СКРЫННИКОВ (2004), pp. 5-332. Pushkin generally pictures him as a capable and cunning character. Cf. ФИЛОНОВЪ (1889), pp. 122-123.

50 This was an inside joke of Pushkin's: namely, it was Shuysky who had organized exactly such a transfer of the Tsarevich's remains a year later, after the death of False Dimitry. DUNNING (2006), p. 65. On Shuysky's historical position in the Duma of Boris' time, see ПАВЛОВ (1992), pp. 76-77.

51 ПУШКИН, Борис Годунов (ред. Бетеа), pp. 95-103 (I).

as many researchers have already noticed, although all the key events mentioned in the scene are based on Karamzin's descriptions of historical facts<sup>52</sup>, their layout contains some chronological inaccuracies. The city of Chernigov, mentioned as besieged by the forces of the Pretender, was taken on 26<sup>th</sup> of October, 1604; the offer of help from the Swedish king can also be dated to 1604; however, the threats sent by False Dimitry to Boris were most likely made no earlier than February or March 1605. But either way, the presence of Schelkalov is an anachronism, as he was fired from service by 1602 at the latest. Finally, the patriarch's account of miracles on the grave of Tsarevich Dimitry is also historically unlikely, as such stories are only mentioned to be circulating a few years later, during the reign of Vasily Shuysky (Tsar as Vasily IV)<sup>53</sup>. Since information regarding all these historical facts can be found in Karamzin, Pushkin's primary historical source, the discrepancies were likely conscious deviations on Pushkin's part: relevant events (and persons) compressed into a single whole for increased dramatic effect.

#### 4. *Mussorgsky's "Boris Godunov" and the role of the Duma in it*

Modest Mussorgsky (1839-1887) was a Russian romantic composer, a member of the Mighty Handful, noted for his interest in Russian history, folklore, and other national themes, as well as the rejection of the conventions of Western music<sup>54</sup>. The idea of taking Boris Godunov as the subject for an opera was suggested to him by his friend, the philologist Vladimir Nikolsky in 1868, and Mussorgsky took to it promptly<sup>55</sup>. The opera itself, first completed in 1869, has a history of numerous revisions, one by the composer himself (in 1872), another two by his friend and colleague Nikolay Rimsky-Korsakov (1896 and 1907)<sup>56</sup>, and another by Dmitry Shostakovich (1963). In addition, two restorations of the composer's original scores (both the original and the revised versions) were published by Pavel Lamm and Boris Asafyev (1928) and David Lloyd-Jones (1975). The rehearsals began in the fall of 1873, and

52 For a comparative analysis see Филоновъ (1889), pp. 36-40.

53 Городецкий (1969), pp. 145-146; Лотман (2008c), pp. 293 and 295-296; DUNNING, EMERSON, FOMICHEV, LOTMAN, WOOD (2006), pp. 491-492. Regarding Schelkalov see also ПАВЛОВ (1992), p. 76.

54 For his biography see Головинский, Сабинина (1998).

55 ХУБОВ (1969), p. 370.

56 Rimsky-Korsakov's last version received further structural alterations by Sergei Diaghilev for the opera's European premiere in Paris in 1908.

the opera premiered on 27<sup>th</sup> of January, 1874 at the Mariinsky Theatre in Saint Petersburg<sup>57</sup>.

Just like Pushkin's *Boris Godunov*, Mussorgsky's opera also faced censorship issues, although not of the same kind. He only started composing it after the ban on depicting clerics in the theatre, and thus Pushkin's play, was lifted, and while the ban by the Nicholas I against depicting Tsars in opera was still in effect. The first draft was rejected in 1871, primarily for not having a prominent female role, which was unacceptable by the standards of the time<sup>58</sup>. It was removed from the imperial Mariinsky Theatre's repertory in 1882, a year after the composer's death, and subsequent attempts to reinstate it were personally blocked by the Tsar Alexander III<sup>59</sup>.

The Duma (played by a male choir) is shown in the second scene<sup>60</sup> of the final (fourth) act of the opera. The scene begins with Schelkalov reading the Tsar's proclamation requesting for the boyars to pass their judgment upon the Pretender<sup>61</sup>. They then proceed to argue in which way (each more gruesome than the other) False Dimitry should be tortured and executed. Only when this is done, Shuysky arrives and informs the Duma of the madness that has seized the Tsar. In this, Mussorgsky joins Pushkin's *Царская дума* with Boris' death, as the Tsar arrives right behind Shuysky, still haunted by the sight of Dimitry's ghost as he enters the council room. He then composes himself and takes his seat, taking charge of the proceedings. Before he can do anything further, Shuysky brings the monk Pimen before the Tsar, and his account of the miracle of Dimitry's relics curing a blind shepherd causes Boris to feel faint. He dismisses the boyars, summons his son, gives out some final advice to him, briefly prays and dies soon afterwards.

The discussion among the Boyars was presented by dividing the choir into two groups (placed to the left and right of the scene), each further divided into two parts (by vocal register) that present differing opinions, a revolutionary solution in the treatment of the choir in opera, which, as a norm of the time, provided a unison backdrop or an antiphonous support to the scene's protagon-

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57 For details on the creation and revisions of the opera, see EMERSON, OLDANI (2004), pp. 67-93; ГОЛОВИНСКИЙ, САБИНИНА (1998), pp. 345-386; ХУБОВ (1969), pp. 363-383.

58 EMERSON, OLDANI (2004), p. 74. For a detailed review of the censorship issues, see ЛАЩЕНКО (2011), pp. 72-129.

59 EMERSON, OLDANI (2004), p. 107.

60 The first scene of the act was omitted in the 1871 version of the opera.

61 This part is omitted in Korsakov's revision, and the scene begins with the boyars discussing what to do with the pretender without a preamble.

onist, rather than being a collective protagonist itself<sup>62</sup>. The two choruses that get this treatment are the boyars and the ‘masses’, both of which engage in an active dialogue and even verbal conflict<sup>63</sup>. This way of presenting the Duma, rather than having a smaller number of characters (named or not) actively participate, with other boyars being silent roles, as one might do in a theatre play, is a logical product of the opera conventions of the time, in which the dramatic role of a choir was prominent.

In addition, as can be noticed, Mussorgsky deliberately omits the Patriarch’s role in the Duma<sup>64</sup>, and gives the role of proclaiming the shepherd’s miracle to Pimen (presented by Schelkalov as a ‘humble chronicler’) instead, opting to present the work in a more ecclesiastically neutral setting<sup>65</sup>.

## 5. Comparative overview

### 5.1. Composition of the Duma

According to Berh’s lists, there were eighteen boyars at the time of Boris’ coronation and twenty-one at the time of his death, while he had himself raised seven people to that rank<sup>66</sup>. Sergeyevich points out that there were ten *okolnichie* at the end of Godunov’s reign<sup>67</sup>. As for *dumnie dvoryane*, he finds twelve of them by the end of the 16<sup>th</sup> century: the number was unlikely to change drastically<sup>68</sup>. Klyuchevsky’s analysis of the available sources shows that the Duma at the start of Godunov’s reign as Tsar was composed of forty-five members of various ranks, including those he had appointed himself right after ascending the throne<sup>69</sup>. According to Pavlov’s detailed research, there were fifty-two members of the Duma by the end of 1598, an unusually

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62 EMERSON, OLDANI (2004), p. 194. Contrary to that, the choir of priests at the trial of Radames in Verdi’s *Aida* (which premiered only three years before *Boris Godunov*, in 1871.) is as uniform as Mussorgsky’s choir of monks in the first act of his opera. See Giuseppe Verdi, *Aida [Score]*, Dover Publication 1989.

63 MUSSORGSKY, LAMM (1960).

64 It is noteworthy that the Patriarch’s active role was also omitted in the coronation scene, where he is a silent character, as it would have been unacceptable for a church dignitary to be presented as singing in a theater.

65 EMERSON, OLDANI (2004), p. 93.

66 БЕРХЪ (1833), pp. 13-14.

67 False Dimitry immediately appointed another four. СЕРГѢВИЧ (1890), p. 390.

68 СЕРГѢВИЧ (1890), p. 434.

69 КЛЮЧЕВСКИЙ (1902), p. 270.

high number, but by 1605 it had dropped to thirty-eight<sup>70</sup>. Re-examining that data would fall outside the scope of our research, so we can presume that there were about forty people in the Duma at the time covered by the play and opera. Not all of those would be present in Moscow at the same time: many would be occupied by various (military or civilian) duties elsewhere in the country or abroad. As available data indicates, no more than half of the total number of members of the Duma would be present at an average session<sup>71</sup>.

In Pushkin's play, no fixed number of members of the Duma is indicated. They are mentioned only as 'boyars' in the description of the scene, and as it unfolds, we see that there should be more than six of them. Four are mentioned by name: Trubetskoy, Basmanov, Schelkalov and Shuysky; Trubetskoy and Schelkalov have no lines, but are merely given orders by the Tsar<sup>72</sup>. After the Duma is adjourned and 'all the boyars' leave after the Tsar, two unnamed boyars exchange a few remarks regarding what had transpired. As their casual mention as the first and second boyar makes it highly unlikely that they were the only two not explicitly named in the scene, we can only assume that at least a few more extras were supposed to be present. A sketch by the artist Matvey Andreyevich Shishkov, made in 1870 for the premiere of Pushkin's drama in the Mariinsky Theatre (and later reused, as well as his other sketches, for Mussorgsky's opera), shows a group of fourteen boyars seated near the Tsar, and another four further away<sup>73</sup>.

Although that particular scene does not mention any of the lower ranks of the Duma, but speaks only generally of the boyars, Schelkalov had already been mentioned as the *верховный дьяк*, the chief of the Duma, in the second scene of the play: as stated before, it was a position of considerable power<sup>74</sup>. It

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70 ПАВЛОВ (1992), pp. 64-66. Pavlov also remarks that, although Tsar Boris appointed members of his own family to the Duma, they did not skip rank (but became, as usual, *okolnichie* first), and, more importantly, Boris's opponents were appointed in no small numbers as well. This shows Godunov's desire to make peace with his opposition, to stay faithful to tradition and secure a peaceful reign.

71 See КЛЮЧЕВСКИЙ (1902), pp. 404-406.

72 Schelkalov's position was already mentioned; the rest are historically accurate. See ПАВЛОВ (1992), p. 66.

73 ХУБОВ (1969), p. 405. The sketches are also available online at <http://www.mussorgsky.ru/album22.html> and [https://commons.wikimedia.org/wiki/File:Shishkov\\_-\\_Palace\\_of\\_Facets.jpg](https://commons.wikimedia.org/wiki/File:Shishkov_-_Palace_of_Facets.jpg) The opera even re-used the costumes and the scenography of Pushkin's play two years prior. EMERSON, OLDANI (2004), p. 100.

74 The historical Vasily Schelkalov and his elder brother Andrey were prominent poli-

is in accordance with that role that the Tsar commands him to send orders to the dukes (military commanders)<sup>75</sup>.

However, in Pushkin's *Boris*, one more person is present and plays a prominent role in the Duma scene: the Patriarch. His monologue, the longest in the play (seventy verses)<sup>76</sup> makes up approximately half of the whole scene and contains the most important part of the exposition. The Tsar does ask him for council in such hard times and treats him with great respect, but it is in no way implied that the Patriarch's presence in the Duma is something extraordinary.

The Patriarch or other representatives of the Church, as already stated, were not members of the Duma. Still, they collaborated on many occasions. It was not unusual for the head of the Russian Orthodox Church to attend the Duma either alone or with the whole Holy Council of the Church (Освященный собор; *Синод*) when matters of mutual importance were to be discussed. Such joint sessions were usually referred to as the Sobor (Собор), 'Council' or 'Assembly', and not the Duma; but apart from that (and one can hardly expect precision regarding relatively obscure legal terminology in a romantic work of art), the Patriarch's presence in discussing such a matter is completely in accordance with the legal history of the Duma<sup>77</sup>.

As we can see, Pushkin is not concerned with representing the Duma in realistic numbers or, for that matter, any concrete numbers at all. He cares only for the characters needed to further the plot and achieve desired dramatic effect. But regarding those, he is mostly historically accurate as far as names are concerned and completely accurate regarding their legal or institutional position.

In Mussorgsky's *Boris*, the only boyars mentioned by name are Schelkalov and Shuysky. As Mussorgsky's libretto, unlike Pushkin's play, contains a list

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tical figures of the time. Skrynnikov refers to Andrey Schelkalov as 'the mighty chancellor' (могущественный канцлер) during the reign of the previous Tsar, Feodor Ivanovich. For some time, Andrey Schelkalov's power was greater than Godunov's; still, Godunov managed to remove him from service in 1594; nevertheless, his brother Vasily immediately took over his position as the chief *dyak* and the keeper of the state seal. Скрынников (1983), pp. 86-88. Andrey Schelkalov was also punished multiple times for purposefully altering decisions of the Duma. Ключевский (1902), p. 459.

75 «Щелкалов! разослать | Во все концы указы к воеводам, | Чтoб на коня сaдились и людей | По старине на службу высылaли (...)».

76 Хворостьянова (2008), p. 350.

77 See Ключевский (1902), pp. 510-524.



of *dramatis personae*, Schelkalov is listed in it as ‘Andrey Schelkalov, *dyak* of the Duma’<sup>78</sup>. No other ranks within the Duma are mentioned. The exact number of the other boyars, divided into four groups, is again not indicated, but was to be determined by the size of the choir. As with Pushkin, the size of the Duma would be a matter of practical consideration for Mussorgsky, varying depending on the theatre or troupe performing the opera, but each of the groups engaging in debate would have to consist of several members at least<sup>79</sup>.

As mentioned previously, the presence of the Patriarch in the Duma scene was also omitted, in favour of the chronicler Pimen. Thus, the opera shows us an ‘ordinary’ session of the Duma, without the active participation of the Church. The monk Pimen takes no formal part in the discussion or decision-making: he is merely brought to testify on a matter relevant for the Duma’s decision.

Thus, Mussorgsky’s composition of the Duma, although different from Pushkin’s, is also historically credible. It is worth noting that the composer puts the Duma as a whole into focus far more than Pushkin does: there are less prominent persons who individually take part in the proceedings, but the unnamed boyars are explicitly divided into four groups that engage in debate with each other. This also makes them far more active than Pushkin’s Duma, which we shall see in more detail below.

## 5.2. *Competence of the Duma*

As previously mentioned, the competence of the Duma was very broad and determined largely by custom<sup>80</sup>. Naturally, such a variety of activities cannot be seen in its artistic representations, where the Duma appears only in the context of one highly relevant political issue, the threat represented by the False Dimitry.

The session of Pushkin’s Duma is a purely political one. The Tsar presents an immediate military and political threat to the boyars and gives orders

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<sup>78</sup> Модест Петрович Мусоргский, Борис Годунов, 3, 46.

<sup>79</sup> As can be seen in the various versions by the Bolshoi Theatre, the number of boyars is presented as at least 30 men. See e. g. Мусоргский, Борис Годунов [фильм Веры Строевой]; Modest Mussorgsky, *Boris Godunov* [DVD].

<sup>80</sup> For a closer review of the known activities of the Duma during Boris’ reign, see ПАВЛОВ (1992), pp. 228-232.



regarding military action, mentioning briefly a diplomatic matter as well, having rejected an offer of alliance against the Pretender from the Swedish king. Finally, Boris expresses his doubts on how to pacify the unrest that the Pretender's lies had caused amongst the people without resorting to force<sup>81</sup>. To this goal he first seeks the Patriarch's counsel, but then accepts Shuysky's modification of the plan. Although the actual proceedings would have been slightly more formal and the participation of the boyars likely more active (see below), there is nothing materially incorrect in the type of issues discussed and the manner of decisions passed.

In Mussorgsky's *Boris*, the Duma meets for a session that at first seems to be a trial: the Tsar orders them, via a missive read by Schelkalov, to pass judgment on the Pretender for his various crimes. But given the fact that False Dimitry is not yet caught (and is, in fact, marching against Moscow with an army), it is clear that it is still a political decision that is sought. Given that Mussorgsky's Duma scene ends with Boris' sudden death, no formal decision as such is passed in the end. All of this is, again, historically credible.

However, another thing here calls to our attention: the fact that Boris commands the Duma to condemn the Pretender and the session begins in the Tsar's absence, even though he can be expected to arrive at any moment. This turn of events seems highly unlikely in the historical context. Although it would not be unheard of for the Duma to decide on an important matter without the Tsar, all historical records of such cases have happened when the Tsar was unable to join the Duma<sup>82</sup>. If he was already within the court and expected to come (as is the case here), the Duma's work would hardly start without him. Informal discussions between the boyars would have been credible (including even the debate in which manner the pretender should be executed), but formal proceedings would wait for the Tsar. In the opera, however, Schelkalov is immediately instructed by the first group of the boyars to write down their decision<sup>83</sup>. Regardless of whether Mussorgsky was aware that this was a historical inaccuracy (which we have no chance of knowing), his portrayal of such behaviour of the boyars was, as we are about to see, quite deliberate.

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81 «На площадях мятежный бродит шепот, | Умы кипят... их нужно остудить; | Предупредить желал бы казни я, | Но чем и как? решим теперь».

82 See Ключевский (1902), pp. 421-423.

83 Most, if not all, stagings of *Boris* show him as starting to write right away, instead of waiting for the discussion to end and for a final decision to be passed.

### 5.3. *Manner of the Duma's work: procedure and dynamics*

Having analysed Godunov's appointments to the Duma and his skilful efforts to preserve tradition and the balance of power, mostly avoiding direct action against his political opponents, Pavlov concludes that «on the eve of the Time of Troubles there was unrest mostly not at the top of the social ladder (among the boyars), but in the lower layers of the Russian society»<sup>84</sup>. This general feeling was well transmitted by both artists: both in the play and the opera, the Duma as a whole is on Boris's side and attempts to find solutions to the problems at hand. Nevertheless, some differences between the two works of art are obvious.

Although many individual boyars have fairly prominent and narratively relevant parts elsewhere in the play, Pushkin's Duma is represented as fairly passive and obedient to the Tsar during its session. This can be seen even purely quantitatively. Most of the verses (lines) in the scene, as stated already, belong to the Patriarch, to be precise seventy. Boris himself has barely over half that number, that is to say thirty-six. The boyars are the last, though seemingly close behind with a total of thirty-two verses; however, twenty-one of those are spoken by Shuysky in response to the Patriarch's plan. Not counting this prominent character (himself a future Tsar), the only boyar to speak during the actual session of the Duma is Basmanov, accepting the Tsar's order (to him and Trubetskoy) to give military aid to the besieged city of Chernigov and swearing to capture the Pretender within three months, all in six brief verses. The final five lines belong to the already mentioned unnamed boyars exchanging remarks after the session is adjourned.

The reader is left with the impression that the Duma (or maybe Sobor) was summoned primarily in order for the Tsar to give commands to the boyars and to seek the Patriarch's counsel. Although Boris suggests that the Duma as a whole should decide on how to solve the problem of unrest (решим теперь), only Shuysky shows some initiative (as he does elsewhere in the play); the other boyars are obedient and mostly silent. Perhaps the most indicative part is that, having issued the commands regarding military action, Boris concludes that such is the Tsar's decree and the verdict of the boyars<sup>85</sup>,

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84 «(...) накануне Смуты беспокойно было прежде всего не на верху социальной лестницы (в боярской среде), а в нижних слоях русского общества». Павлов (1992), pp. 79 and also 232.

85 «Таков | Указ царя и приговор боярский».

without the present boyars<sup>86</sup> having spoken a single word. But regarding the plan for pacifying the unrest, not even their tacit agreement is underlined: Boris merely concludes «Да будет так!» (So be it!) and prompts the Patriarch to join him for a private talk. The session isn't even formally adjourned in any way. It wasn't formally opened, either, but as the scene begins with the Tsar's monologue, such an opening could have implicitly taken place before the curtain rose. The lack of a formal closing is evident by the Tsar simply exiting and the boyars following suit. It seems that the Duma cannot (or will not) do anything without the Tsar.

Finally, nobody is mentioned making a written record of the passed decisions, which the *dyaks* surely would have done. As with the exact number of the boyars, Pushkin apparently ignores (rather than being ignorant of) the details and formalities of the Duma's workings that would have served no purpose in achieving his desired dramatic effect. Pushkin's Duma turns out more passive than would be realistic (active discussions and arguments were quite frequent)<sup>87</sup>, but this could be interpreted as underlining the Duma's supporting Boris and agreeing with him, which would not be inaccurate.

On the other hand, Mussorgsky's Duma is a much more active body and some more formalism is shown in its work. These activity and formality are underlined practically to the point of caricature. Quantitatively speaking, the boyars dominate this scene<sup>88</sup>. Up to the point when Boris feels faint and commands the boyars to leave, adjourning the session<sup>89</sup>, the boyars have a

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86 Basmanov and Trubetskoy leave early in the scene, directly upon accepting the Tsar's order.

87 See e. g. Ключевский (1902), pp. 415-421.

88 One must keep in mind that Mussorgsky has removed some individual boyar characters from Pushkin's play and decreased the significance (number of lines) of others; cf. Соловьева (2005). The boyars *en masse*, as a whole, although they feature in the opera prior to the session of the Duma, are not distinct and active participants up to that point. In the coronation scene, they are present, but not narratively separated from the choir of the people praising Boris. In the first scene of the fourth act in front of the Cathedral of Vasily the Blessed, they follow the Tsar on his way from the Cathedral and give out alms to the poor, but they have no lines. The second, Duma scene is the first time they are treated as a collective protagonist. Still, it could be said that the (narratively and musically) conflicting boyars are still not represented as a single whole. See Михайлова (2009), p. 280.

89 The scene continues beyond that point, with Boris's dying instructions to his son and a funereal chorus, but that final part is of no relevance for the portrayal of the Duma as an organ.

grand total of ninety-six lines. Even though Shuysky is still prominent (he has thirty-nine lines, and Schelkalov sixteen), the unnamed boyars, the collective body of the Duma, still have a majority of forty-one. Pimen's account of the miracle at Dimitry's grave consists of thirty-seven lines, while Boris himself has only nineteen. Here, the Tsar is the mostly passive actor.

Mussorgsky paints a scene of arrogance and pointless cruelty, counterpointed by ineffectiveness, elevated to a grotesque. Schelkalov brings a written order from the Tsar for the Duma, although Boris himself is on his way to the session as well. Upon hearing the order, a group of boyars claim that they have had an opinion on the matter ready for quite a while, and instruct Schelkalov to start writing it down<sup>90</sup>. Before they can speak further, another group jumps in with their own 'verdict'. Thus arguing and interrupting each other from time to time, the Duma passes a judgment of increasingly terrible and cruel tortures upon the Pretender, twenty-four verses long. One group of the boyars even has to remind the others that the must be caught first in order to be executed, but nobody elaborates on how that is to be done: everyone keeps suggesting what is to be done to him once his is caught. The issue of unrest among the people or the idea of convincing them that the Pretender is not Dimitry do not come up at all.

Only after the decision is passed do the boyars complain at the absence of Shuysky and how their decision didn't turn out well without him. The absurdity is further accentuated by Boris (when he arrives after all that chaos) saying how he has called upon the boyars to help him, relying on their wisdom<sup>91</sup>. The aforementioned historically illogical situation of the boyars' decision-making without the Tsar and the Duma's most distinguished member in attendance could, perhaps, be explained by the composer's need for a dramatic device to adequately channel and accentuate his criticism of the old nobility without targeting any individual character. Also, this way he avoided a possible insult to the station of the Tsar, as neither Boris nor Shuysky took part in the debacle.

The active debate in Mussorgsky's Duma is, generally speaking, much more in accordance with how a regular session of the Duma must have looked like. However, the contents of that debate and the inability of the boyars to properly tackle the serious political problem at hand are not. One could say

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90 «Да наше мнение давно готово. | ( к Щелкалову ) | Пиши, Андрей Михайлыч (...)».

91 «Я созвал вас, бояре, | на вашу мудрость полагаюсь (...)».

that Mussorgsky's portrayal of the Duma, as well as Pushkin's, is subordinated to a single central idea. But his idea was less of a narrative nature, and more meant as a critique of the arrogance and inefficiency of the old Tsarist regime. Having in mind Mussorgsky's general commitment to the truth in his works, we cannot doubt that this critique was honest<sup>92</sup>. But as is frequently the case with emotional critique, its object was not represented overly accurately.

## 6. Conclusion

Both Pushkin's and Mussorgsky's *Boris Godunov* are, without a doubt, masterpieces. Both have been heavily based on historical facts (or at least results of historical research that were dominant at the time), but they are mostly focused – as is only appropriate! – on personal drama of the characters and major political events. Nevertheless, they also both contain a depiction of an important legal institution, the Duma. The basic historical facts regarding its competence and composition, as well as the role that it must have generally played in the time of Tsar Boris' reign are accurate enough in both works of art. If we look at the cold facts of whom the portrayed organ is composed of and what it is summoned to do, then, without a doubt, we see the Duma in both *Borises*.

But, naturally, these things are not sufficient for a correct impression of any institution: we need to know not only 'who' and 'what', but also 'how', and maybe even, to an extent, 'why'. In portraying this, the poet and the composer differ drastically. Pushkin's Duma is excessively restrained and passive. While it is credible as an institution of government and a gathering of the Tsar's supporters, one would be hard-pressed to recognise a body full of differing political opinions and active debate. In the drama as such, it is mostly a backdrop for the characters of the Tsar, Patriarch and Shuysky. Mussorgsky's Duma, on the other hand, is quite historically active and vivid, but incorrectly shown as incompetent and unable to grasp the key problem presented to it, disabled from doing so by its own arrogance. It is an active actor in the opera (prominent not only because of the stage time, but also because of the dynamic and, at the time, revolutionary division of the choir), but it is far from being historically accurate.

Of the two, Pushkin's Duma is closer to the real one. Its representation

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92 See TARUSKIN (2005), p. 618.

might lack dynamic and activity, but contains no misinformation. Mussorgsky's *Duma* is too much of an apparent critique, too grotesque at times to be considered credible. Still, the actual *Duma* was, among all other things, a gathering of competent prominent people who should be able (in a situation such as that portrayed in the play) to advise the Tsar and devise solutions to the problem at hand. Neither the *Duma* in the play nor the one in the opera fully give out that impression. However, the degree of accuracy and the level of detail provided are at a high level for works of stage drama, further aided by a long tradition of aesthetic presentation maintained by Russia's greatest theatre houses throughout their history. This promotes the interest and a desire for understanding the important and turbulent times they depict in an enlightened audience in the true spirit of romantic masterpieces they are.

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THE DREYFUS AFFAIR IN MUSIC.  
*L'HYMNE À LA JUSTICE* BY ALBÉRIC MAGNARD

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1. *Introduction*

Many historians have narrated the events that constituted the Dreyfus Affair and established their role in helping to transform contemporary political culture in France<sup>1</sup>. The Dreyfus case became one of the significant political events in French history because underscored and intensified bitter divisions within French politics and society. The fact that it followed other scandals – the Boulanger affair, the Wilson case, and the bribery of government officials and journalists that was associated with the financing of the Panama Canal – suggested that the young French Republic was in danger of collapse. The controversy involved critical institutions and issues, including monarchists and republicans, the political parties, the Catholic Church, the army, and strong anti-Semitic sentiment.

Alfred Dreyfus, an obscure captain in the French army, came from a Jewish family that had left its native Alsace for Paris when Germany annexed that province in 1871. In 1894 papers discovered in a wastebasket in the office of a German military attaché made it appear that a French military officer was providing secret information to the German government. Dreyfus came under suspicion, probably because he was a Jew and because he had access to the type of information that had been supplied to the German agent. The army authorities declared that Dreyfus' handwriting was similar to that on the papers. Despite his protestations of innocence, he was found guilty of treason in a secret military court-martial, during which he was denied the right to examine the evidence against him. The army stripped him of his rank in a humiliating ceremony and shipped him off to Devil's Island, a penal col-

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1 See THOMAS (1961); GUILLEMIN (1964); BAUMONT (1976); BREDIN (1983); BIRNBAUM (1994); BIRNBAUM, BERLIERE (1994); BURNS (1994); CAHM (1994); DROUIN, APRILE (1994); DUCLERT (1994); REBERIOUX (1994); CREPIN (2003); DUCLERT (2006); BREDIN (2006); ORIOLE (2008); DROUIN (2008); WHITE (2008); DUCLERT, SIMON-NAHUM (2009); PAGES (2010); DUCLERT (2014).

ony located off the coast of South America. The political right, whose strength was steadily increasing, cited Dreyfus' alleged espionage as further evidence of the failures of the Republic. Édouard Drumont's right-wing newspaper *La Libre Parole* intensified its attacks on the Jews, portraying this incident as further evidence of Jewish treachery.

Dreyfus seemed destined to die in disgrace. He had few defenders, and anti-Semitism was rampant in the French army. An unlikely defender came to his rescue, motivated not by sympathy for Dreyfus but by the evidence that he had been 'railroaded' and that the officer who had actually committed espionage remained in position to do further damage. Lieutenant Colonel Georges Picquart, an unapologetic anti-Semite, was appointed chief of army intelligence two years after Dreyfus was convicted. Picquart, after examining the evidence and investigating the affair in greater detail, concluded that the guilty officer was a Major named Walsin Esterhazy. Picquart soon discovered, however, that the army was more concerned about preserving its image than rectifying its error, and when he persisted in attempting to reopen the case the army transferred him to Tunisia. A military court then acquitted Esterhazy, ignoring the convincing evidence of his guilt.

The 'affair' might have ended then but for the determined intervention of the novelist Émile Zola, who published his denunciation (*J'accuse!*)<sup>2</sup> of the army cover-up in a daily newspaper. Zola was found guilty of libeling the army and was sentenced to imprisonment. He fled to England, where he remained until being granted amnesty. At this point public passion became more aroused than ever.

Now in the public sphere, the 'affair' seized the attention of not only major political but intellectual and literary figures on both sides of the question. Strenuous ideological combat did not subside with the 'closure' of the it: the presidential pardon of Dreyfus in 1899, followed by his exoneration in 1906. In fact, two leagues continued the fight: the *Ligue de la Patrie Française* and the *Action Française*<sup>3</sup>.

These leagues did share certain features with others of the Right that were born of the 'affair': as opposed to political parties, which proposed a 'global' program, leagues were distinguished by their strictly limited political aims. Finally, unlike parties, they wished to 'destabilize' the government, believing the parliament to protect special interests, thus to be guilty of corruption as

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2 See PAGES (2010), pp. 83- 300.

3 See JOLY (2015), pp. 5-180.

well as irresponsibly negligent of the French electorate. In search of a more unified society, they rejected political parties as too divisive and embraced anti-Semitism, perceiving Jews, like Dreyfus, yet another factor in the loss of community.

The impact of such nationalist theories was limited not only to politics and to literature: there was also an impact in the French composers.

In that period in France, the Conservatoire National de Musique controlled traditional education in music, while the Schola Cantorum, with its director Vincent d'Indy<sup>4</sup>, follows nationalist theories in music. It was through courses at this academy that he spread his theories and initiated the revival of interest in Gregorian plainchant and music of the 16<sup>th</sup> and 17<sup>th</sup> centuries. D'Indy also

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4 Vincent d'Indy, in full Paul-Marie-Théodore-Vincent d'Indy (Paris, 27<sup>th</sup> March 1851-Paris, 1<sup>st</sup> December 1931), French composer and teacher, remarkable for his attempted, and partially successful, reform of French symphonic and dramatic music along lines indicated by César Franck. D'Indy studied under Albert Lavignac, Antoine Marmontel, and Franck (for composition). In 1874 he was admitted to the organ class of the Conservatoire de Paris, and in the same year his second *Wallenstein Overture* was performed. He considered French 19<sup>th</sup>-century music and the tradition of the Paris Opéra, of the Paris Conservatoire, and of French 'decorative' symphony to be superficial, frivolous, and unworthy to compete with the Teutonic Bach-Beethoven-Wagner tradition. The character of his own music revealed meticulous construction but also a certain lyricism. His harmony and counterpoint were laboriously worked out, but in his later work, free and unorthodox rhythms came easily and fluidly. D'Indy's most important stage works were *Le Chant de la Cloche* (1883), *Fervaal* (1895), *Le Légende de Saint Christophe* (1915), and *Le Rêve de Cinyras* (1923). Among his symphonic works, *Symphonie sur un chant montagnard français* (1886), with solo piano, based entirely on one of the folk songs d'Indy had collected in the Ardeche district, and *Istar* (variations; 1896) represent his highest achievements. His one hundred and five scores also include keyboard works, secular and religious choral writings, and chamber music. Among the latter are some of his best compositions: *Quintette* (1924); a *Suite for flute, string trio, and harp* (1927); and the *String Quartet n. 3* (1928-1929). He also made arrangements of the hundreds of folk songs that he collected in the Vivarais. In 1894 d'Indy became one of the founders of the Schola Cantorum in Paris. It was through courses at this academy that he spread his theories and initiated the revival of interest in Gregorian plainchant and music of the 16<sup>th</sup> and 17<sup>th</sup> centuries. D'Indy also published studies on Franck (1906), Ludwig van Beethoven (1911), and Richard Wagner (1930), in which he presented the three composers as the pillars of the symphonic tradition. In France, Paul Dukas, Albert Roussel, and Déodat de Séverac were among his disciples. Outside France, particularly in Greece, Bulgaria, Portugal, and Brazil, his influence was lasting upon composers interested in shaping folk music into symphonic forms. See THOMSON (1996), pp. 116-139.

published studies on César Franck (1906), Ludwig van Beethoven (1911), and Richard Wagner (1930). In France, Paul Dukas<sup>5</sup>, Albert Roussel, and Déodat de Séverac were among his disciples. Outside France, particularly in Greece, Bulgaria, Portugal, and Brazil, his influence was lasting upon composers interested in shaping folk music into symphonic forms.

D'Indy was also a prominent member of the *Ligue de la Patrie Française* and much more damaging to his legacy, however, have been his anti-republican and anti-Semitic convictions, honed in large part by the Dreyfus Affair.

## 2. Albéric Magnard and l'Hymne à la Justice

However, it was, unexpectedly, a colleague and friend of d'Indy, and a

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5 Paul Dukas's fame rests on a single orchestral work, the dazzling, ingenious *L'Apprenti sorcier* (1897). Dukas studied at the Paris Conservatory and, after winning a second Grand Prix de Rome with his cantata *Velléda* (1888), established his position among the younger French composers with the overture, first performed in 1892, to Pierre Corneille's *Polyeucte* and with the *Symphony in C Major* (1896). The rest of his output (never large, owing to his own strict censorship of his works) was mainly dramatic and program music and compositions for piano. Dukas, a master of orchestration, was from 1910 to 1912 professor of the orchestral class at the Paris Conservatory, and from 1927 until his death he was professor of composition there. He also contributed musical criticism to several Paris papers, and his collected writings, *Les Écrits de Paul Dukas sur la musique* (1948), include some of the best essays ever published on Jean-Philippe Rameau, Christoph Gluck, and Hector Berlioz. Dukas's *L'Apprenti sorcier* (based on Goethe's ballade *Zauberlehrling*) was a piece of descriptive music written at the same time and in much the same style as Richard Strauss's *Till Eulenspiegel*. Yet Dukas's musicianship was of a considerably wider range than this brilliant period piece suggests. His *Sonate* (1901) is one of the last great works for piano that prolong the tradition of Ludwig van Beethoven, Robert Schumann, and Franz Liszt; his *Variations*, interlude et final pour piano sur un thème de Rameau (1903) represent an elegant translation into French musical idiom and style of Beethoven's *Diabelli Variations*. The ballet *La Péri* (1912), on the other hand, displays mastery of Impressionist scoring; and, in his opera *Ariane et Barbe-Bleue* (1907), on the play of Maurice Maeterlinck, the atmosphere and musical texture make up for the lack of dramatic impact. After 1912 Dukas ceased publishing his composition, except for a piano piece written in memory of his admirer Claude Debussy, the evocative *La Plainte au loin du faune* (1920), and a song setting, the charming *Sonnet de Ronsard* (1924). A few weeks before his death, he destroyed several of his musical manuscripts. Dukas collaborated with the Paris publishing firm of Durand in preparing modern editions of some of the works of Jean-Philippe Rameau, François Couperin, and Domenico Scarlatti and of the piano works of Beethoven. See PALAUX-SIMONNET (2001); PERRET, RAGOT (2007).

member of the Faculty of the Schola Cantorum, Albéric Magnard, who wrote a 'dreyfusard work', *l'Hymne à la Justice*<sup>6</sup>.

Albéric Magnard<sup>7</sup> guided his career as a composer in a manner that seems in retrospect to have intentionally restricted any chance that his works would gain adherents and enter as part of the active repertory. Born to relative wealth and social prominence in 1865, the son of the editor of *Le Figaro*, Magnard pursued a musical career after training in the law. Following a trip to Bayreuth in 1886, Magnard decided to devote himself exclusively to music. He was determined not to exploit his family's standing and influence on his own behalf. Although he studied with Massenet and later with Vincent d'Indy, he did little to cultivate the support of fellow composers or the leading performers of the day. He spent his time quite apart, composing, except for some teaching at d'Indy's Schola Cantorum, the rival institution to the Conservatoire de Paris. Periodically, Magnard would self-finance a concert of his own music. In this manner, Magnard maintained a principled distance from all of the rival factions and byzantine politics within the Parisian musical establishment.

In 1914, at the beginning of the I World War, Magnard sent his wife and two daughters to a safe hiding place while he stayed behind to guard the estate of 'Manoir de Fontaines' at Baron, Oise. When German soldiers trespassed, he fired at them, killing one of them, and they fired back and set the house on fire. It is believed that Magnard died in the fire, but his body could not be identified in the remains. The fire destroyed Magnard's unpublished scores, such as the orchestral score of his early opera *Yolande*, the orchestral score of *Guercoeur* (the piano reduction had been published, and the orchestral score of the second act was extant) and a more recent song cycle.

Magnard, like d'Indy, «was fundamentally a Romantic who approached music as a representation of the inner life, but being an idealist, he sought a perfect order, as sustained by 'beauty' and 'justice'»<sup>8</sup>.

When the 'affair' broke out, Magnard, despite the fact that he was teaching counterpoint at the Schola Chantorum, he declared himself a 'dreyfusard'. He became deeply absorbed in the fundamental issues surrounding the *Affair*, resigning his commission as an officer because his beliefs concerning

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6 See FULCHER (1999), pp. 74-76.

7 See CARRAUD (1921).

8 FULCHER (1999), p. 76.

them were so strong. Along with the opera *Guerceur*<sup>9</sup>, which preceded it, the *Hymne à la Justice* is the most important ‘political’ message that Magnard, an ardent defender of human rights (and of women’s rights, being one of the first advocates for women’s right to vote) left us. It is not surprising to find him amongst the ‘dreyfusards’ at the moment of the *Affair* that divided France at the time. The day after the publication of Emile Zola’s *J’accuse* he sent a vibrant letter of support<sup>10</sup>. He had just finished the first act of *Guerceur* and was thinking about the second, which was to depict a populace despicable like the one that condemned Dreyfus. Four years later (September/October 1901–30<sup>th</sup> March 1902), he composed *l’Hymne à la Justice*, dedicating it to the Nancy glassmaker Emile Gallé<sup>11</sup>, another important defender of

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9 The action – in effect confined to the second of the three acts – takes place in an unspecified town in the Middle Ages, though the parallel with events and attitudes of recent times is striking, all the more so because the opera was written as long ago as 1900. The orchestral score of the outer acts was destroyed in 1914 when the Germans killed Magnard and set fire to his mansion after he had shot two of their calvary: his friend Guy Ropartz reconstructed the work from the vocal score, and it was finally produced at the Paris Opera only in 1931. The noble hero *Guerceur*, who had freed his people from tyranny, has died and is in heaven, but is discontent at having been snatched from life, he pleads with the Supreme Being (a female personification of Truth) to be allowed to return to earth, and on the intercession of Goodness and Beauty she agrees to let him descend to the ‘world of illusion’, with the stipulation that Suffering, which had played no part in his life, should accompany him so that he may be humbled and purified. In Second Act he finds that his former disciple and friend Heurtal has become the lover of his wife Giselle, who had sworn to be faithful to him alone until death. Heartbroken, he yet forgives her, but is appalled to discover that Heurtal is now cynically bent on seizing power for himself and that the people, unable to make a success of a free society, are clamouring for a return to dictatorship. *Guerceur*’s appeals to them are in vain: they turn on him and kill him in mob fury. Betrayed both in love and in his faith in humanity, he returns to Heaven penitent (Third Act), with the bitter realization that all is vanity. Truth looks forward to the day when mankind will at last learn reason and love freedom.

10 «Bravo, Monsieur, vous êtes un crâne. En vous l’homme vaut l’artiste. Votre courage est une consolation pour les esprits indépendants qui préfèrent la justice à leur tranquillité, qui ne tremblent pas à l’idée une guerre étrangère et qui ne sont pas aplatis devant ce sinistre hibou de Drumont et ce vieux polichinelle de Rochefort. Marchez. Vous n’êtes pas seul. On se fera tuer au besoin». See MAGNARD, VLACH (1997), p. 138.

11 Émile Gallé, (Nancy, 8<sup>th</sup> May 1846–Nancy, 23<sup>rd</sup> September 1904), celebrated French designer and pioneer in technical innovations in glass. He was a leading initiator of the Art Nouveau style and of the modern renaissance of French art glass. The son of a successful faience and furniture producer, Gallé studied philosophy, botany, and drawing,



human rights<sup>12</sup>. The work's first performance, like that of many other form the same pen, took place thanks to his friend Guy Ropartz<sup>13</sup>, who conducted

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later learning glassmaking at Meisenthal, France. After the Franco-German War (1870-1871), he went to work in his father's factory at Nancy. He first made clear glass, lightly tinted and decorated with enamel and engraving, but he soon developed the use of deeply coloured, almost opaque glasses in heavy masses, often layered in several thicknesses and carved or etched to form plant motifs. His glass was a great success at the Paris Exhibition of 1878, and he became known as a spirited designer working in contemporary revival styles. Gallé's strikingly original work made a great impression when it was exhibited at the Paris Exposition of 1889. Over the next decade his glass, reflecting the prevailing interest in Japanese art, became internationally known and imitated. It contributed largely to the free, asymmetric naturalism and symbolistic overtones of Art Nouveau. He employed wheel cutting, acid etching, casing (i.e., layers of various glass), and special effects such as metallic foils and air bubbles, calling his experiments *marqueterie de verre* ('marquetry of glass'). At Nancy he led the revival of craftsmanship and the subsequent dissemination of crafted glass by way of mass production. At the height of its productivity, during the late XIX century, his workshop employed nearly three hundreds associates. He attracted numerous artisans, including the Art Nouveau glassmaker Eugène Rousseau. After Gallé's death his glass enterprise continued production until 1913. See GARNER (1976); NEWARK (1989).

12 On 31<sup>st</sup> March 1902 Magnard wrote to Gallé his intention to dedicate his *Hymn* to him: «Mon cher ami, je viens de terminer mon morceau d'orchestre intitulé Hymne à la Justice. Puis-je vous le dédier ? Vous me feriez une grande joie en acceptant le modeste hommage que je désirais rendre depuis longtemps à l'homme et à l'artiste exquis que vous êtes. Présentez, je vous prie, mes respectueux souvenirs à Madame et à Mesdemoiselles Gallé et croyez-moi bien affectueusement vôtre». See MAGNARD, VLACH (1997), p. 185. Gallé died few months later the creation of the *Hymne*, but in time to listen it. Magnard was very moved by Gallé's death: «La mort de Gallé m'a causé une grande douleur. Bien que je ne l'ai vu que sept à huit fois dans ma vie, j'avais pour ce grandissime artiste une véritable vénération. La dernière exposition de verreries à l'exposition nancéienne au Pavillon de Flore m'avait enthousiasmé et je tiens cet homme pour un des grands créateurs du siècle écoulé». See MAGNARD, VLACH (1997), p. 219.

13 Ropartz was born in Guingamp, Côtes-d'Armor, Brittany. He studied initially at Rennes. In 1885 he entered the Conservatoire de Paris, studying under Théodore Dubois, then Jules Massenet, where he became a close friend of the young Georges Enesco. He later studied the organ under César Franck. He was appointed director of the Nancy Conservatory (at the time a branch of the Paris Conservatory) from 1894 to 1919, where he established classes in viola in 1894, trumpet in 1895, harp and organ in 1897, then trombone in 1900. He also founded the season of symphonic concerts with the newly created orchestra of the Conservatory, ancestor of the Orchestre symphonique et lyrique de Nancy. Ropartz was associated with the Breton cultural renaissance of the era, setting to music the words

it at the Conservatory of Nancy on 4<sup>th</sup> January of 1903. It remains, along with the *Chant funèbre* and the last two symphonies, his best known and most often played orchestral work. In August of 1944, significantly, *l'Hymne* opened the program of the first concert given by the Orchestre National in liberated Paris.

It's helpful, for a short analysis of the *Hymne*, the *Programme* written appositely at the première by Gaston Carraud:

«Nous entendons, dans la première idée, se succéder l'oppression de l'injustice et l'appel douloureux à la justice. Brutalement terrassée, la victime lève les yeux vers l'idéal inaccessible. Avec une plainte qui réveille la persécution, elle voit s'évanouir la douce lueur; mais au même moment que la violence impose son retour le plus insolent, le triomphe de la justice éclate, foudroyant, en apothéose»<sup>14</sup>.

The first section of the *Hymne* begins in a stunning way, with a brutal first

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of Breton writers such as Anatole Le Braz and Charles Le Goffic. He also supported Breton regional autonomy, joining the Breton Regionalist Union in 1898. He also was the Honorary President of the Association des Compositeurs Breton that was founded in 1912. In the early stages of World War I his friend and fellow composer Albéric Magnard was killed defending his house from German invaders. His house was destroyed, along with several musical manuscripts. Ropartz reconstituted from memory the orchestration of Magnard's opera *Guercoeur*, which had been lost in the fire. From 1919 to 1929 Ropartz was director of the Strasbourg Conservatory, which he moved into the building of the former parliament of Alsace-Lorraine. At the same time he undertook the direction of the Philharmonic Orchestra of Strasbourg, influencing young students like Charles Munch. Elected in 1949 as a member of the Académie des Beaux-Arts (fifth section, musical composition), he succeeded Georges Hüe. Ropartz also served as a juror with Florence Meyer Blumenthal in awarding the Prix Blumenthal, a grant given between 1919 and 1954 to young French painters, sculptors, decorators, engravers, writers, and musicians. He retired in 1929 and withdrew to his manor in Lanloup, Brittany. He continued to compose until 1953, however, when he became blind. His musical style was influenced by Claude Debussy and César Franck. However he self-identified as a Celtic Breton, writing that he was the son of a country «Where the goblins populate the moor and dance by the moony nights around the menhirs; where the fairies and the enchanters – Viviane and Merli – have as a field the forest of Brocéliande; where the spirits of the unburied dead appear all white above the waters of the Bay of the Departed». Shortly after Ropartz died, René Dumesnil wrote in *Le Monde*: «There is with Ropartz a science of folklore and its proper use, which one admires; but more often than the direct use of popular motifs it is an inspiration drawn from the same soil which nourishes the work, like sap in trees». FERREY, MENUT (2005).

14 CARRAUD (1921), p. 161.

theme (agité in B minor). In total contrast, the second section (very calm) has a distant string *tremolo* creating a vision of inaccessible peace. The third large section serves as a recapitulation. It begins at the peak of violence in the main key (B minor). The oppression is fiercer than ever, and every exit seems blocked. But suddenly, «Le triomphe de la justice éclate, foudroyant, en apothéose», with the rising-scale theme, previously an inaccessible vision and now proclaimed in B major. At the end, the music confirm the victory of right with an admirable hymn that express total piece in a moving *pianissimo*.

### 3. Conclusion

Albéric Magnard has dedicated an orchestral *Hymn* to justice and another to Venus<sup>15</sup>; they embody the two pillars of his man's commitment and of his artistic inspiration: the moral requirement as a prerequisite for the existence of a community founded on justice, goodwill and love<sup>16</sup>. In Magnard, a great singer of the human soul, and in his music, it is inevitable to speak first about the expression of his emotions, before any technical consideration, because for him the means of language are never a goal in themselves and artisan-ship is entirely dedicated to the author's message. That said few creators have been so concerned with perfection, the only guarantee of total communication. This composer had the most uncompromising worship of what is called pure music, far from any anecdote or any scenic surface. Even his operas are

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15 «Magnard was a man of high integrity and lofty principles. His two symphonic poems, the Hymn to Justice and the Hymn to Venus, carry forward his legacy of moral rectitude and certitude. Not surprisingly from one of the very first Dreyfusards, the piece exalting justice was written first, completed in 1902. Soon thereafter, he began composition of the work we hear today. The composer had the deepest respect for women. He was madly in love with his wife Julia and apotheosized his mother, who had committed suicide when Magnard was only four. In his strict sense of social order, he elevated fidelity in marriage to the most exalted of heights. He was ultimately less an Alberich and more a Fricka. Musically, the piece begins pastorally, with angelic harp and flute filigree. The sumptuous main theme is developed expansively in an unhurried manner. After a tempestuous section, Berliozian in character, sensual threads of flute, horn, oboe and cello lead to an expression of unbridled passion. Beyond this physical pleasure, love grows and flowers in a spiritual manner, reinforced by chorale passages. Finally, triumphant appreciation of that most magical of human bonds ends with a glorious processional conclusion (it is a hymn after all). How sad that a couple so deeply devoted to one another was robbed of their opportunity to grow old together». KIRSHNIT (2007).

16 HALBREICH, PERRET (2001), p. 102.

based on structures belonging to the great organic form. Also, within a musical production that testifies a ruthless self-criticism and the pangs of a slow, relentless work, Magnard's catalog contains only twenty-one items. Furthermore, Magnard, as we said, died young, tragically killed before the age of fifty. After long decades of ignorance, the music of Magnard, who knew during his lifetime a restricted notoriety, especially in the circle of his friends and colleagues, has emerged since from oblivion. The language of Magnard is not revolutionary like that of his contemporary Claude Debussy. He is faithful to tonality, but that asserts itself not only with a rare vigor, but also with a radicalism that explores all the possibilities. Hardly chromatic in the context of a time still influenced by Wagner's *Tristan and Isolde*, this language, enriched by the specifically use of French modal scales, can reach powerful dissonant tensions through the intensive use of suspensions, appoggiaturas, auxiliary notes.

Magnard is also a descendant of Rameau, who was both the most tonal and dissonant composer of his time. Magnard is also a great rhythmist, in a historical period in when classical music was tending towards languor. He attains a vigor and a variety worthy of Beethoven, to the point that his ideas are frequently printed in our memory by their simple rhythmic profile. His harmonies are robust and full, renouncing all *sfumato* in their solid righteousness. He was also a master of counterpoint, which in him is always polymelodic: all voices sing, and the word «Chantez» frequently returns in his scores.

This musical testimony of Magnard's commitment to the 'dreyfusard' cause establishes him as an intellectual, in the new definition that the *Affair* generates: namely, a personality who uses his fame to show to the public his political position on a public affair. After his death on 2<sup>nd</sup> September 1914, Magnard becomes the symbol of the murdered artist. The photographs of his house made on fire by German soldiers are in the form of anti-German propaganda postcards. Magnard is erected as a martyr of the patriotic cause and his music is deliberately played with the idea of denouncing the 'barbaris Tudesque' which denounces the exactions on the territories under its domination. Maurice Barrès<sup>17</sup>, French writer and politician, influ-

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17 After completing his secondary studies at the Nancy lycée, Barrès went to Paris to study law but instead turned to literature. Then he embarked on a solitary project of self-analysis, through a rigorous method described in the trilogy of novels entitled *Le Culte du moi*. This work comprises *Sous l'oeil des Barbares* (1888), *Un Homme libre* (1889), and *Le Jardin de Bérénice* (1891). At the age of twenty-seven he embarked on a tumultu-

ential through his individualism and fervent nationalism and a strenuous anti-Dreyfusard<sup>18</sup>, calls Magnard ‘knight of civilization’ and pays tribute to him<sup>19</sup>. Meanwhile the French dramatist Edmond Rostand<sup>20</sup>, a committed

ous political career. He ran successfully for deputy of Nancy on a platform demanding the return to France of Alsace-Lorraine. From this patriotic stance he adopted an increasingly intransigent nationalism. This stage was minutely reported in a new trilogy of novels, *Le Roman de l'énergie nationale* (1987), made up of *Les Déracinés* (1897), *L'Appel au soldat* (1900), and *Leurs figures* (1902). In these works he expounded an individualism that included a deep-rooted attachment to one's native region. *Les Déracinés* tells the story of seven young provincials who leave their native Lorraine for Paris but suffer disillusionment and failure because they have been uprooted from their native traditions. With Charles Maurras, he expounded the doctrines of the French Nationalist Party in the pages of two papers: *La Cocarde* and *Le Drapeau*. His series of novels entitled *Les Bastions de l'Est* (*Au service de l'Allemagne*, 1905; Colette Baudoche, 1909) earned success as French propaganda during I World War. *La Colline inspirée* (1913) is a mystical novel that urges a return to Christianity for social and political reasons. At times, however, the artist may be found to supersede the politician in Barrès' writing. His travels in Spain, Italy, Greece, and Asia inspired the beautiful pages, free from ideology, of *Du sang, de la volupté et de la mort* (1894) and of *Un Jardin sur l'Oronte* (1922). He was elected to the French Academy in 1906. VAJDA (2000).

18 «Barrès determined, “It is possible that Dreyfus is not guilty, but it is absolutely certain that France is innocent”. According to the anti-Dreyfusard intellectuals, it was better to sacrifice Dreyfus's individual human rights than to sacrifice the well-being of the collective nation that secured these rights for all». SHURTS (2017), p. 62

19 «C'était un musicien français, un disciple de Jean Racine, dont il transpose le chant dans son art. S'il avait travaillé à poser une digue au flot wagnérien, s'il s'était défendu des influences nocives du génie germain, ce n'était pas pour tolérer que les plus sales gens de là-bas s'en vinssent chez lui. Voici les Ulhans! Il quitte son piano, il tire dessus et les abat. Chacun, selon son pouvoir! Joffre les chassera de France. Albéric Magnard balaye le devant de sa maison. Et tous l'imitant, la France serait toute propre. Gloire à ce fils harmonieux de Racine, à ce défenseur du génie français!». BARRES (1915), p. 15.

20 Rostand's name is indissolubly linked with that of his most popular and enduring play, *Cyrano de Bergerac*. First performed in Paris in 1897, with the famous actor Constant Coquelin playing the lead, *Cyrano* made a great impression in France and all over Europe and the United States. The plot revolves around the emotional problems of Cyrano, who, despite his many gifts, feels that no woman can ever love him because he has an enormous nose. The connection between the Cyrano of the play and the 17th-century nobleman and writer of the same name is purely nominal. But Rostand's stirring and colourful historical play, with its dazzling versification, skillful blend of comedy and pathos, and fast-moving plot, provided welcome relief from the grim dramas that emerged from the naturalist and Symbolist movements. Rostand wrote a good deal for the theatre, but the only other play

‘dreyfusard’<sup>21</sup>, indissolubly linked with that of his most popular and enduring play, *Cyrano de Bergerac*, dedicated to Magnard these verses:

«Celui-là qui rebelle à toute trahison  
Et préférant la Muse à toute Walkyrie  
A défendu son art contre la barbarie  
Devait ainsi mourir, défendant sa maison.  
Mort pleine de clarté, de goût et de raison !  
D’une œuvre et d’un destin, par faite symétrie  
Qu’ il aille aux profondeurs où se fait la patrie,  
Près des poètes fiers du disciple qu’ils ont.  
Deux ombres lui viendront parler de Bérénice  
Que leur rivalité par ce héros finisse !  
Dressons-lui pour tombeau la pierre de son seuil  
Et dans le plus doux sol que ce Français sommeille  
Qui, réconciliant la mesure et l’orgueil,  
Chante selon Racine et meurt selon Corneille»<sup>22</sup>.

In conclusion, the *Affaire Dreyfus* was the first big test of a modern justice system and it defined one of the central issues of democracy: should the rule of law be applied consistently, or are there cases in which it should be bent to fit a current crisis or pressing national concern? Therein lies the *Affaire Dreyfus* and Magnard’s *Hymne à la Justice* true lesson. Too often these days, panicked governments are undermining citizens’ rights and freedoms in the name of battle crime or terrorism. However, reading these accounts of France in a similar anxious age and listening the musical representation of these problems in Magnard’s *Hymn*, reminds us that a nation once twisted itself in knots over the fate of an obscure captain and ultimately choose justice. Thus,

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of his that is still remembered is *L’Aiglon* (1900). This highly emotional patriotic tragedy in six acts centres on the Duke of Reichstadt, who never ruled but died of tuberculosis as a virtual prisoner in Austria. Rostand always took pains to write fine parts for his stars, and *L’Aiglon* afforded Sarah Bernhardt one of her greatest triumphs. Rostand’s son Jean Rostand (1894-1977) was a noted biologist, moralist, and writer. See LLOYD, LLOYD (2002).

21 «Although it was written before the height of the Dreyfus Affair, *Cyrano de Bergerac*’s success must be set against the backdrop of the Affair. While the play appealed to partisans on both sides, Rostand himself was a Dreyfusard. Rostand’s son Maurice writes of his father’s ardent Dreyfusard belief: “My father was a Dreyfusard of the first hour, he was a Dreyfusard with passion, courage, and energy that illustrates that if he had wanted to go into politics, he would have done so with aplomb”». DATTA (2011), p. 88.

22 ROSTAND (1915), p.1.

Dreyfus, the unlikely hero, Magnard with his *Hymne* and France have shown what is possible when people remain true to their values.

For Magnard justice is above all a moral principle, a sublime form and guarantor of order. He never been capable of writing the terrible phrase of Goethe who admitted to prefer «an injustice to disorder»<sup>23</sup>.

Magnard was an implacable enemy of cowardice and of the intellectual dishonesty, which generates injustice. Even through the *Affair* that inspired the *Hymne à la Justice*, Magnard's work remains to denounce the injustices of today and tomorrow<sup>24</sup> and to remind us that justice is an aspiration that needs to be fixed every day by man.

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23 Johann Wolfgang Goethe (1822), *Belagerung von Mainz*, in *Gesamtausgabe*, Stuttgart, Cotta, 1960, p. 517.

24 According to Gaston Carraud, who pays a public tribute to Magnard on 25<sup>th</sup> March 1920 at the 'Concerts Padeloup': «L'idée de patrie et l'idée de justice prenaient dans ce cerveau cultivé, mais absolu, et cette sensibilité affinée, la même force d'instinct que chez un homme du peuple». CARRAUD (1921), p. 94.



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## Chapter III

### Architecture and Policy of Justice



*SCIENTIA IURIS AND ARCHITECTURA.*  
A FOCUS ON BUILDINGS FOR SHOWS

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1. *The reason for the prospective research*

The relationship between *scientia iuris* and *architectura* presents various different facets which can be found in particular examples: if we have chosen to specifically examine the norms concerning structures used for events and shows<sup>1</sup>, it is because they had a strong political value (in the etymological sense of the adjective)<sup>2</sup> and because they provide interesting observation points regarding the management of some ‘mass phenomena’<sup>3</sup>.

Indeed, structures used for shows may be considered as a tangible sign of the immense passion that Romans had in particular for *ludi*, *munera* and *venationes*<sup>4</sup>: in fact, Rome is often symbolized by its circuses or amphitheatres.

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1 Literature on spectacles and games in ancient Rome and on structures suitable to host them is really immense: for more detailed indications, I would refer to PASQUINO (2016), where further specific aspects are investigated.

2 On the political value of these buildings, CLAVEL-LÉVÊQUE (1984), in part. pp. 129 ss.; GROS (1987), pp. 319 ss.

3 CARCOPINO (2014), p. 239, affirms: «gli spettacoli furono la grande diversione alla disoccupazione dei (...) sudditi, e, per conseguenza, il sicuro strumento dell’assolutismo». As a proof of a demagogic praxis it has to be quoted the famous invective of Juvenal (*Iuv. Sat.* 10.78 ss.) against ‘Remus’ people’ that «(...) duas tantum res anxius optat, panem et circensem»: see CECCARELLI-MOROLLI (2015), p. 23. Much interesting are also Front. *Princ. hist.* 18.24-25: «populum romanum duabus praecipue rebus, annona et spectaculis, teneri» and Amm. 28.4.29, against *odiosam plebem*: «hi omne, quod vivunt, vino et tesseri inpendunt et lustris et voluptatibus et spectaculis: eisque templum et habitaculum et contio et cupitorum spes omnis Circus est maximus: et videre licet per fora et compita et plateas et conventicula circulos multos collectos in se controversis iurgiis ferri, aliis aliud, ut fit, defendentibus». The importance of games is indirectly shown by mosaics and paintings in which the protagonists are celebrated; furthermore, albeit gladiators were considered as despicable persons, their bravery should have encouraged young Romans to be better than them: GREGORI (2011), pp. 41 ss.; DUPONT (2011), p. 283 s.

4 In Rome many different types of shows existed: the most ancient were the horse-drawn carts (*ludi circenses*) and theatrical performance (*ludi scaenici*); to these were added, in time, *munera gladiatoria*, then *venationes*, as well as athletic games, called *agones*

The several types of games, that initially started out – even if in different times<sup>5</sup> – as religious ceremonies, were immediately very successful, so much that an extensive number of people participated (that is why we talk about ‘mass phenomena’); and the number of these events continued to grow so exponentially that, according to Filocalo’s *Fasti*, by 354 A.D., 177 days were reserved, or at least destined, for shows<sup>6</sup>.

This soon characterized with a strong political connotation the games, which became an instrument for propaganda during the election times<sup>7</sup> and were used to control the population, providing in the meantime an occasion for the common people to meet and compare themselves with the ruling class.

This explains why, even if public housing was generally an effective expedient for political ascent, the construction of buildings where was possible to attend to *ludi*, *munera* and *venationes* started to have so great importance<sup>8</sup>: it is not a coincidence that, among the most monumental and majestic buildings that we have inherited from the Roman world, those that hosted shows

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or *certamina graeca*, because of their origin. And, during the Principate, it is possible to notice an almost perfect equivalence between type of shows and type of architectural structures: circuses for *ludi circenses*, theatres for *ludi scaenici*, amphitheatres for gladiator games and animal hunts, and stadiums for *certamina graeca*. The most popular games (as can be seen from traditional Roman iconography), which attracted the greatest number of people, were the horse-drawn carts and the fights between men or with animals. Although the term *ludi* is often related to every kind of spectacles, we consider more valid the idea, according to which this term was adequate just for *ludi circenses* and *scaenici*, but not for *munera*: POLVERINI (1975-1976), p. 2022 s.

5 *Ludi circenses* are the oldest ones: according to Livius (Liv. 1.9.6-7), the famous ‘rape of Sabine women’ occurred during *ludi sollemnes*, that consisted in horse-drawn carts; *ludi scaenici* were celebrated for the first time in 364 b.C. (Liv. 7.2.3), even if they were introduced in the official festivities only in 240 b.C.; the first fight between gladiators was organized privately in 264 b.C. (Val. Max. 2.4.7; Liv. *per.* 16), but they obtained public acknowledgment in 42 b.C.; for the first time in 186 b.C. both animal hunts (*venationes*) and athletic games (Liv. 39.22.2) were offered (by M. Fulvius Nobiliore).

6 *CIL*, I<sup>2</sup>, 1, 254 ss.: among these 177 days, 101 was destined for *ludi scaenici*, 66 for *circenses* and 10 for gladiator shows.

7 So that the *lex Tullia de ambitu* forbade candidates to finance a *munus* in the two years prior the vote: Cic. *In Vat.* 15.37; *Pro Sest.* 64.134-135.

8 Public housing was a common instrument for political ascent: lots of structures for mass entertainment were built between the end of the Republic and the beginning of Empire: LUGLI (1942), p. 55; BODEI GIGLIONI (1974), pp. 107 ss., 123 ss., 185 ss.; BRUNT (1980), pp. 96 ss.; MORLINO (1984), p. 622 nt. 9; TRISCIUOGGIO (1998), p. 157 nt. 152.

are the ones that definitely stand out. Moreover, this explains why the methods of building and organizing suitable structures for shows had a strong symbolic meaning as well.

Regarding exactly this last point, what happened during the imperial age is rather emblematic: as theatrical scenes became richer, an imaginary setting was created, where none was admit to enter, but projecting himself only as a mere spectator<sup>9</sup>. Thus, it is not surprising that the kind of *homo spectator* makes his first appearance in such a particular historical moment: the true protagonist of the political scene was the emperor and the citizen was meant to be just an on-looker.

## 2. The information provided by Marcus Vitruvius Pollio

In the examination of some interesting sources, it should be firstly considered a famous passage belonging to the Vitruvian treaty, where, on a theoretical level, the relationship between *scientia iuris* and *architectura* is emphasized: it is written, with regards to the various subjects which adorn (*ornare*) the background of the architect, that he must know the *responsa iurisconsultorum*:

Vitr. *de arch.* 1.1.3: «(...) Et ut litteratus sit, peritus graphidos, eruditus geometria, historias complures noverit, philosophos diligenter audierit, musicam scierit, medicinae non sit ignarus responsa iurisconsultorum noverit, astrologiam caelique rationes cognitatas habeat».

This knowledge is necessary in order to define situations which are legally important (for example, among the others, the existence of a *paries communis* or a real servitude) before proceeding to build, both to avoid any controversies between *patres*, as well as to suggest adequate *leges* to be stated in the contracts:

Vitr. *de arch.* 1.1.10: «(...) Iura quoque nota habeat oportet, ea quae necessaria sunt aedificiis communibus parietum ad ambitum stillicidiorum et cloacarum, luminum. Item, aquarum ductiones et cetera quae eius modi sunt, nota oportet sint architectis, uti ante caveant quam instituant aedificia, ne controversiae factis operibus patribus familiarum relinquuntur, et ut legibus scribendis prudentia cavere possit et locatori et conductor; namque si lex perite fuerit scripta, erit ut sine captione uterque ab utroque liberetur».

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<sup>9</sup> BETTO (1993), p. 26.

This teaching therefore implies – and the obvious consequence is still valid today – that the architect must take into account all of the (*lato sensu* normative) rules, when erecting new buildings, to determine where and how to build.

In the fifth book of his work, Vitruvius dedicates much writing specifically to the construction of theatres, buildings whose importance is implicitly emphasized by the theorist of architecture himself, who describes them immediately after discussing the place where the most important affairs in city life took place, the *forum*.

From the above selected fragments, it seems that particular attention is given to the choice of the location, both for reasons concerning the spectators' health, as well as for the need for good acoustics, upon which he writes a great deal. However, almost all of the dictated rules do not seem to be based upon specific legal dispositions, but only on assessments of a technical nature or considerations that we may define as 'good-sense' (for example, when Vitruvius affirms that the proportions indicated may not be applied indistinctly for all types of theatres, pursuant to the principle of functionality or the usage for which the building is destined). But it is possible to underline an exception. Because in describing the *pulpitum* Vitruvius (*de arch.* 5.6.2) affirms that «In orchestra autem senatorum sunt sedibus loca designata»; he makes, therefore, an indirect reference to the seating arrangement within the theatre, upon which specific provisions and rules were directly applied. Among these it is important to mention, at least, the *Lex Roscia theatralis* of 67 b.C. and the so-called *Lex Iulia theatralis*.

The *lex Roscia*<sup>10</sup> was a plebiscite, through which a privilege was reestablished after being abolished probably by Silla; this privilege, introduced by a legislative disposition (the so called *Lex theatralis de XIV ordinibus*, maybe of 146 b.C.), reserved for *equites* in occasion of *ludi scaenici* the fourteen rows immediately after the orchestra, where the senators were indeed seated.

The *Lex Iulia theatralis*<sup>11</sup> was then made by Augustus after that a senator

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10 See ROTONDI (1912), p. 374 s.; about the *Lex theatralis de XIV ordinibus*, see p. 294. Similar provisions can be read in some municipal statutes: e.g., *tabula Heracleensis* (ll. 135-139, where it is forbidden to citizens to seat during shows in the places reserved for senators or *decuriones* of local *ordo*); *lex coloniae Genetivae Iuliae Ursonensis* (chap. 66, 125-127).

11 This name is given by Pliny (Plin. *Nat. hist.* 33.8.32), while Svetonius (Svet. *Aug.* 44) mentions a *decretum patrum*, in describing all the dispositions about seating arrangement between different types of spectators: from his report we learn how in Rome soldiers,



in Puteoli was forced to sit among the crowd of common people. It is especially from the dispositions contained in this provision – about which Svetonius gives a detailed report – that we can know interesting information regarding the social and political assessment of the seats within various buildings destined to the shows.

On this matter, the recent thoughts of Martin Avenarius appear notably interesting: the scholar has argued that the idea (arose in ancient Greek), by which the seating arrangement of the public in the theatre reflected the social and political structure of community worked, in Rome in two ways, in the sense that assigning places not only reflected social position, but also contributed to create a new one<sup>12</sup>.

In particular, with regard to the law promoted by Augustus, the scholar emphasizes the use of the connection between *Theaterordnung* and *Gesellschaftsordnung* which made the *princeps* affirm the *Prinzipatsverfassung*, together with the underlying ideology, as well as the new norms of matrimonial and family law: in this sense, the best places were indeed assigned to those who were married and had children. So, it is possible to say that law used structural characteristics of theatre to impose itself.

Still from the *De architectura*, a very precious piece of information is found for the identification of the legal overview for buildings destined for shows. Vitruvius<sup>13</sup>, in fact, within his dissertation regarding the distribution of public buildings, talks about three criteria (*defensio, religio, opportunitas*) and, referring to the latter, recalls common places *ad usum publicum* and lists «(...) portus, fora, porticus, balinea, theatra, ambulationes ceteraque, quae isdem rationibus in publicis locis designantur». Therefore, it is possible to conclude

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married plebeians, *praetexti*, pedagogics and women were socially considered. Everyone has his own place, so that social hierarchy was respected.

12 AVENARIUS (2015), pp. 59 ss., where previous literature; see in part. RAWSON (1987), pp. 83 ss.

13 Vit. 1.3.1: «Partes ipsius architecturae sunt tres: aedificatio gnomonice, machinatio. Aedificatio autem divisa est bipertito, e quibus una est moenium et communium operum in publicis locis conlocatio, altera est privatorum aedificiorum explicatio. Publicorum autem distributiones sunt tres, e quibus est una defensionis, altera religionis, tertia opportunitatis. Defensionis est murorum turrimque et portarum ratio ad hostium impetus perpetuo repellendos excogitata, religionis deorum immortalium fanorum aediumque sacrarum conlocatio, opportunitatis communium locorum ad usum publicum dispositio, uti portus, fora, porticus, balinea, theatra, inambulationes ceteraque, quae isdem rationibus in publicis locis designantur».

that, at least during the writing of the treaty, theatres were considered *res publicae in publico usu*.

An implicit confirmation in this sense seems evident in a famous passage of the *De officiis*, where Cicero critically analyzes the theme of *prodigalitas* with regards to public buildings, declaring his disapproval of the expenses for «theatra, porticus, nova templa», differently from those for walls, shipyards, ports, aqueducts and all of those constructions which «ad usum rei publicae pertinent».

Cic. *de off.* 2.60: «Atque etiam illae impensae meliores, muri, navalia, portus, aquarum ductus omniaque, quae ad usum rei publicae pertinent, quamquam, quod praesens tamquam in manum datur, iucundius est, tamen haec in posterum gratiora. Theatra, porticus, nova templa verecundius reprehendo propter Pompeium, sed doctissimi non probant, ut et hic ipse Panaetius, quem multum in his libris secutus sum non interpretatus, et Phalereus Demetrius, qui Periclem, principem Graeciae vituperat, quod tantam pecuniam in praeclara illa propylaea coniecerit».

In the vehement attack of Cicero, which had a great political importance<sup>14</sup>, it is possible to find a contraposition between structures for which the expense of large sums of money was justified and structures for which the same expense corresponded to a waste of money.

Now, the parameter adopted by the orator to formulate this contraposition is the *usus rei publicae*, in the sense that public money was to be used only for those constructions that were of common utility. But even if only some of the mentioned buildings were actually ‘useful’, all of them could be used by all the *cives*, which means that all of them were, indeed, of ‘public use’.

Therefore, it is possible to affirm, with a good margin of truth, that starting from the first century b.C. structures used for events and shows were considered public goods. This is far from expectation, especially considering the fact that in Rome stable structures, which hosted shows, began to be built with significant delay. Up until the first century b.C., in fact, the constructions were often erected upon private initiative and were made of wood, temporary and ready to be dismantled as soon as the show was over<sup>15</sup>. An image which

14 See MORLINO (1984), pp. 626 ss.

15 About the passage from temporary to stable structures relating to various types of buildings for shows (circuses, theatres, amphitheatres, stadiums), PASQUINO (2016), pp. 86 ss.

was very interesting was conceived by Florence Dupont<sup>16</sup>: a 'city as an optical illusion' erected in occasion of the games, but destined to disappear immediately afterwards with the destruction of the places in which enjoyment and pleasure were provided.

With reference to this last aspect, it seems important to note that demolishing theatres at the end of the shows became a necessity also for purely political reasons. Theatrical performances, in fact, were looked down upon by the Roman ruling class, which, therefore, was against the construction of stable theatres: allowing people to watch shows, while being seated, in fact meant supporting such activities, which were considered dangerous for the Romans' temperament, in the sense that they could cause a form of weakness<sup>17</sup>. The first stable theatre could have been erected not before 55 b.C., when Pompeus<sup>18</sup>, in a very particular political time-period and in order to affirm his supremacy, built what was defined as a theatre-temple, with a strong political and religious connotation<sup>19</sup>.

The choice of the construction material and the consequent stability (or, on the contrary, the temporary nature) of such buildings became an expression of a clear political decision.

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16 DUPONT (2006), p. 225.

17 From this point of view, in our opinion, different sources may be read relating to what happened in occasion of the first and most notable attempt to erect a *theatrum lapideum*, the theater ordered by *censores* in 154 b.C. It was demolished before the work was even completed, upon order of a *senatus consultum* of 151/150 b.C.; and the *patres* also ordered that no one in the city or within a thousand steps could put seats or watch the *ludi* seated. Val. Max. 2.4.2: «(...) ne quis in urbe propiusve passus mille subsellia posuisse sedensve ludos spectare vellet ut scilicet remissioni animorum standi virilitas propria Romanae gentis nota esset». Cfr. pure Liv. *Per.* 48.23 e Agost. *De civ. Dei* 1.31. The episode is narrated also by App. *Bell. civ.* 1.28, Vell. Pat. 1.15.3; see then Agost. *De civ. Dei* 2.5. The theatre had surely to be built of stone: Oros. *Hist. adv. pag.* 4.21.4: «Eodem tempore censores theatrum lapideum in Urbe construi censuerunt».

18 Plin. *Nat. hist.* 7.158; Aul. Gell. *Noct. Att.* 10.7; Tert. *De spect.* 10.5; Dio Cass. 39.38.6; Plut. *Pomp.* 68.2-3, 42.8, 40.9; Svet. *Claud.* 21.3.

19 TOSI (2003), p. 721 s., according to which Pompeus' theatre «(...) sarebbe l'esempio più significativo e pertinente di Teatro-Tempio, perché le due parti appaiono inserite in un piano unitario, in un nesso inscindibile, con il grande tempio absidato emergente in *summa gradatione* (...)».

### 3. From Vitruvius to legal experts

The testimonies of Vitruvius and Cicero let us find out that structures<sup>20</sup> used for events and shows were destined for ‘public use’ and they were considered, more precisely, as those which will be then defined as *res publicae in publico usu*<sup>21</sup>.

This classification can be attained easily also through legal sources, that, for this matter, follow consistent reasoning from the II century A.D. up until Justinian’s time.

We are now going to show some texts which are pivotal to our argument.

First of all, a famous passage by Ulpian, where Pomponius’ point of view is referred:

Ulp. 57 *ad ed.* D. 47.10.13.7: «Si quis me prohibeat in mari piscari vel everriculum (quod Graece σαγηνη dicitur) ducere, an iniuriarum iudicio possim eum convenire? Sunt qui putent iniuriarum me posse agere: et ita Pomponius et plerique esse huic similem eum, qui in publicum lavare vel in cavea publica sedere vel in quo alio loco agere sedere conversari non patiat, aut si quis re mea uti me non permittat: nam et hic iniuriarum conveniri potest (...)».

On a first approach to the text, it is possible to affirm that the legal matter deals with the protection of a person to whom was forbidden to fish in the sea (possibly, with the use of a specific type of fishing net, the *everriculum*). According to Ulpian, Pomponius «et plerique» resolved the problem through the concession of an *actio iniuriarum*, since this hypothesis could be compared to similar situations, such as those in which people were forbidden from doing certain activities, like, for example, washing in public or sitting in a *cavea publica*<sup>22</sup>.

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20 Vitruvius and Cicero refer only to theatres, but we believe that their evaluations can be valid also for the most ancient buildings for shows, *i.e.* circuses.

21 The destination to public use was for that matter a fundamental criterion for defining the ‘public’ character of *res*, referring to which Roman jurists began, from the first Imperial age, to elaborate several classifications: buildings for events and shows are *res publicae* really because they were in *publico usu* (for the difference between *res publicae in publico usu* and *res publicae in pecunia populi*, see in part. Pomp. 9 *ad Sab.* D. 18.1.6 pr.; Pap. 10 *quaest.* D. 18.1.72.1).

22 As SCEVOLA (2012), p. 80 nt. 7, developing some ideas of previous Scholars, affirms, the concession of the *actio iniuriarum* had been possible in these cases because of a gradual expansion of its *Schutzbereich*, so that this *actio* could be also taken against illegal

No doubt, therefore, that the theatre was peacefully thought of as a ‘public good’, since it was destined for use by all people, to the point that not allowing someone to have access to it would be considered by jurists as an offensive act.

Furthermore, it is possible to read an excerpt of *Digesta*, from Marcianus’ *Institutiones*, in which he treats the so called *res universitatis*:

Marc. 3 *inst.* D. 1.8.6.1: «Universitatis sunt, non singulorum veluti quae in civitatibus sunt theatra et stadia et similia et si qua alia sunt communia civitatum (...)».

*Res universitatis* are goods belonging to the *civitates*, such as theatres, stadiums and similar buildings: and the ‘similarity’ is plausibly based on ‘public use’ (in other words, ‘public use’ is what the buildings have in common). Now, *bona civitatis* are subjected to the same regulation of *res publicae*, to which they are compared, even in the name, albeit ‘abusive’<sup>23</sup>.

Finally, by the Justinian era, the most significant testimony was given by a passage from the *Institutiones*, taken from the title (3.19) on *stipulationes inutiles*. In this passage reference is made to a series of *res*, that may not constitute the object of a *stipulatio*, otherwise the penalty will be the ‘uselessness’ of the contract. Next to the *res sacra aut religiosa* is considered the *res publica*, «quae usibus populi perpetuo exposita sit» and, in order to give a few examples, both the *forum* and the theatre are mentioned:

I. 3.19.2: «Idem iuris est, si rem sacram aut religiosam, quam humani iuris esse credebat, vel publicam, quae usibus populi perpetuo exposita sit, ut forum vel theatrum vel liberum hominem, quem servum esse credebat, vel cuius commercium non habuit, vel rem suam dari quis stipuletur (...)».

With regard to this text, it is important to underline the following points. First of all: the qualification of a *res* as ‘public’ comes to light through a relative

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behavior of someone who forbid someone else from using goods destined to public use. It was really important for Roman jurists to preserve the right of all the *cives* to use buildings for shows, since it meant to preserve their essence as *res publicae*, that had an *utilitas* for the benefit of the whole community: instruments for legal protection were *interdicta* and, as seen, the *actio iniuriarum* (in addition to Ulp. 57 *ad ed.* D. 47.10.13.7, cit. *supra*, see Ulp. 68 *ad ed.* D. 43.8.2.9).

23 Zoz (1999), pp. 75 ss. Ulpian (Ulp. 10 *ad ed.* D. 50.16.15) explains indeed that qualification of *res publicae* should concern only goods of Roman people: «Bona civitatis abusive publica dicta sunt: sola enim ea publica sunt, quae populi Romani sunt».

sentence (again «*quae usibus populi perpetuo exposita sit*») where the profile of the ‘public use’ of the *res* itself appears evident. Secondly, it is possible to hypothesize that we are not limited to these two examples, so that, along with theaters, others may be included in the comparison, such as amphitheatres, circuses and stadiums. In other words, it is possible to argue that, still in Justinian’s time, structures used for events and shows were considered public goods since they were suitable for use by all of the *cives*.

#### 4. Discipline

Once we have highlighted the ‘public nature’ (in connection with *publicus usus*) of buildings to be used for events and shows, it is possible to look in the available sources for some norms directly related to the construction of these buildings.

Important information was provided by Tacitus: in 27 A.D. in Fidene, a freed slave by the name of Atilius had constructed an amphitheater to be used for gladiator shows, but he had not made it either for philanthropic nor political ambition, but rather «in sordidam mercedem», that is to make money off from the gathering of people for the occasion (still, ‘mass phenomenon’). According to Tacitus, Atilius, in fact, erected a structure that was so unstable that it collapsed under the weight of the crowd, causing the death of 50.000 spectators. Furthermore the spectators were not quietly seated, but were standing and cheering wildly, at times even excessively<sup>24</sup>. It is possible to relate it to a famous mob-uprising which occurred a few years later between Pompeians and Nocerini (59 A.D.). Tacitus narrates this episode as well and remembers the disposition with which the senate, after the uprising, forbade

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24 Tac. *Ann.* 4.62: «M. Licinio L. Calpurnio consulibus ingentium bellorum cladem aequavit malum improvisum: eius initium simul et finis extitit. nam coepto apud Fidenam amphitheatro Atilius quidam libertini generis, quo spectaculum gladiatorum celebraret, neque fundamenta per solidum subdidit neque firmis nexibus ligneam compagem superstruxit, ut qui non abundantia pecuniae nec municipali ambitione sed in sordidam mercedem id negotium quaesivisset. adfluxere avidi talium, imperitante Tiberio procul voluptatibus habiti, virile ac muliebre secus, omnis aetas, ob propinquitatem loci effusius; unde gravior pestis fuit, conferta mole, dein convulsa, dum ruit intus aut in exteriora effunditur immensamque vim mortalium, spectaculo intentos aut qui circum adstant, praeceps trahit atque operit (...)». On this episode, see, more recently, CHAMBERLAND (2007), pp. 136 ss.

the Pompeians from holding public shows for the next ten years<sup>25</sup>. In reality, the fight seems to have been triggered by the discontent of the Pompeians when Nero made *Nuceria* a colony (*deductio*) and consequently distributed the territories of *Stabiae* to the new city. Regulus, one of the event planners, was the one who spread the discontent by instigating the masses in order to bring up the matter to Rome: the political exploitation of the *munera* is here very clear. It is very interesting to note that there is a fresco of this particular episode at the National Archeological Museum in Naples, which serves as a testimony of the interrelationship between humanistic sciences; and there is also a graffiti which refers to the same event taken from the House of the Dioscuri in Pompei<sup>26</sup>.

Going back to the narration about Atilius, we read in the *Annales* the account of a *senatus consultum* which was set up after the tragedy, with the objective of forbidding anyone, who was not rich enough («cui minor quadringentorum milium res»), to be able to organize a *munus gladiatorum* and furthermore, of avoiding amphitheaters from being constructed on a site which was not proven to be solid («solum firmitatis spectatae»):

Tac. *ann.* 4.63: «(...) cautumque in posterum senatus consulto ne quis gladiatorum munus ederet cui minor quadringentorum milium res neve amphitheatrum imponeretur nisi solo firmitatis spectatae».

Therefore, from this disposition we can discern the interest of the competent 'government authorities' so that, even in the private sector<sup>27</sup>, norms

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25 Tac. *ann.* 14.17: «Sub idem tempus levi initio atrox caedes orta inter colonos Nucerninos Pompeianosque gladiatorio spectaculo, quod Livineius Regulus, quem motum senatu rettuli, edebat. quippe oppidana lascivia in vicem incessente[s] probra, dein saxa, postremo ferrum sumpserunt, validiore Pompeianorum plebe, apud quos spectaculum edebatur. ergo deportati sunt in urbem multi e Nucerninis trunco per vulnera corpore, ac plerique liberorum aut parentum mortes deflebant. cuius rei iudicium princeps senatus, senatus consultibus permisit. et rursus re ad patres relata, prohibiti publice in decem annos eius modi coetu Pompeiani collegiaque, quae contra leges instituerant, dissoluta; Livineius et qui alii seditionem conciverant exilio multati sunt».

26 *CIL*, 4, 01293.

27 When such structures were built upon public initiative, it was followed the established *iter* for all of *operae publicae*, and the *potestas locandi* was conferred upon *censores*: Liv. 40.51.2 e 41.27.5. The surveillance on these structures was up to magistrates of *Res publica*, in particular *aediles*, *praetores*, *censores*. From Augustus onwards the office was undertaken by *curatores aedium sacrarum et operum locorumque publicorum*, whi-

provided for satisfying public interests, such as security and safety of citizens, would be respected.

The result of this trend seems eloquent from what it is possible to read in a text by Macro preserved in the title 50.10 of *Digesta*, *De operibus publicis*<sup>28</sup>:

Macer 2 *de off. praes.* D. 50.10.3 pr.: «Opus novum privato etiam sine principis auctoritate facere licet, praeterquam si ad aemulationem alterius civitatis pertineat vel materiam seditionis praebeat vel circum theatrum vel amphitheatrum sit. 1. Publico vero sumptu opus novum sine principis auctoritate fieri non licere constitutionibus declaratur».

In the *principium*, the jurist affirms the right of a citizen to proceed with an «opus novum», even if without specific imperial concession, which instead is legally foreseen as necessary if the new construction is to be financed «publico sumptu» (§ 1). But, after having announced the rule, Macro contemplates three exceptions, one of which is the construction of «circum theatrum vel amphitheatrum»: it seems possible to identify a public need, which overrules and thereby limits the full rights of individuals.

Thus, it is possible to come to the following conclusion: on the one hand, the buildings which will be defined as ‘massive’ were subsidized specifically for political aims; but, on the other hand, the law intervened and regulated them so that they were secure for public use and, consequently, suitable for their purpose.

Interest for the *civitas*, related to the construction of these buildings, is also evident in a ‘symmetrical’ prospective of the research. In fact, the location of these buildings allows to identify particular urban needs, which came up also because of the particular nature of the shows that were to be hosted. According to some scholars, it was the necessity to satisfy these needs that caused Roman architects to come up with technical solutions that allowed to raise theaters even if far away from high geographical settings (which allowed construction on slopes)<sup>29</sup>.

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ch were instituted by the *princeps* around 10 b.C.: they «Avevano (...) l’alta vigilanza dei templi e degli edifici pubblici di Roma, esercitavano la direzione delle fabbriche, concedevano l’uso del suolo pubblico ai privati mercé un canone e vigilavano al fine di impedire abusi nell’uso dello stesso suolo»: PALMA (1980), p. 223.

28 Besides title 50.10, *De operibus publicis*, see several titles of book 43 of *Digesta*, as well as titles 8.11(*De operibus publicis*) and 8.12 (*De ratiociniis operum publicorum et de patribus civitatum*) of *Codex Justiniani*, where are replicated many constitutions of title 15.1, *De operibus publicis*, of *Codex Theodosianus*.

29 MAGGI (1991), pp. 304 ss.



Once freedom to build wherever one wanted was achieved, the choice of the place was based on other factors: for example, it was possible to build structures used for events and shows within the same city and close to one another, in order to give life to a 'neighborhood of shows.' But the most significant information, which came from the study of the archeological sites and was confirmed recently, is that these buildings were always well-connected with the city's transport system. This was an answer both to the logistic needs (allowing the entrance and exit of thousands and thousands of people) as well as to functional needs (since many people that lived far away from the city were attracted to spectacles).

In addition and in a more consistent manner, there were needs of visibility, in fact theatres and amphitheatres had to be built in places in which they could better serve their symbolic function and thus consent the maximum spread of images and official ideologies<sup>30</sup>. Not to be forgotten and related to this matter, is the fact that *principes*, who accounted for the strong demagogic significance of the games, paid important amounts of money for their organization, while, at the same time, enriching the city with the construction, decoration, and restoration of monumental buildings that were thus used as an instrument of political propaganda<sup>31</sup>.

## 5. Conclusions

In order to conclude our analysis, a number of assessments may be made:

a) the *architectura*, as an expression of human behavior in the community, is taken into consideration by the *scientia iuris*, which also gives a number of indications on how and where to construct: the architect, thus, is expected to know the *responsa iurisconsultorum* on this topic;

b) the organization of the games and the arrangement of places to host them became an instrument to affirm or consolidate a certain supremacy, so that law in this field accentuates its political consubstantial connotation;

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30 BONETTO (2003), pp. 923 ss.

31 Beginning from Augustus, who was really prodigal in this field, as we know from himself (*Res gestae* 22; 23) and from Svet. *Aug.* 43. Except for Tiberius (Svet. *Tib.* 34.1) and Marcus Aurelius (Hist. *Aug. M. Aur.* 10.10), emperors spent lot of money for games and spectacles: Svet. *Cal.* 18.1; Svet. *Claud.* 21; Svet. *Ner.* 10, 11; Svet. *Dom.* 4; Hist. *Aug. Alex. Sev.* 24.3; 44.7. About the imperial interventions specifically on buildings for shows, see BODEI GIGLIONI (1974), pp. 137 ss., DAGUET-GAGEY (1997), pp. 86-92, pp. 258-307 and pp. 323-377.

c) from norms regarding the construction of structures used for events and shows (juridically set as *res publicae in publico usu*), as well as from the study of the construction materials, of their structural characteristics and of the places where these buildings were erected, it is possible to comprehend the choices made by the ruling class with respect to the management and the exploitation of the games as ‘mass phenomena’.

Apart from the opportunity of these choices, it is important to note that Romans, thanks to an *architectura* increased by the *scientia iuris*, were able to construct monumental buildings, which have survived to our days; and, although some of these buildings have been readapted for different use, these living traces stand in plain sight for all to behold as witness of the grandeur of the Roman people.

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## OPTIMUS PRINCEPS AND THE TRIUMPHAL ARCH IN BENEVENTO

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The object of this study concerns some pictures and writings connected to emperor Trajan's character, his political and social laws, the relation between the *optimus princeps*, as he was defined by his panegyrist Pliny the Younger, and Triumphal Arch in Benevento.

Trajan was a provincial, a Spanish from Baetica; he came precisely from Italica. He was the first emperor who was born in a province out of Rome boundaries<sup>1</sup>.

Trajan's and his father experiences as provincial – we can remember that father of the second one was an imperial administrator, particularly in Syria and in Asia<sup>2</sup>, where he became proconsul during the first century – let him understand how the importance and the vitality of the provincial system was fundamental as the core of the Urbe: in fact, Trajan considered the provincial world such as a pure exploitation settlement.

The appeasement of the provinces, according to Trajan's vision, would have certainly determined a kind of balance of power in the whole empire. For these reasons, he was really careful about the provinces and their needs<sup>3</sup>. On one hand, he chose men of trust as provincial governors, for example we can remember Pliny who was settled in Bitinia<sup>4</sup>; on the other hand, the emperor was extremely judicious in solving even all the smallest questions that happened over there<sup>5</sup>. By this way, he controlled all the provinces. This great attention has been shown yet in the letters between Pliny and Trajan where it is possible to analyze the paternalistic behavior, sometimes even psychological, that Trajan developed towards Pliny, who in turn informed meticulously his emperor about all the questions that arose in the provinces. For example, in a case Trajan agreed about Pliny request for his personal doctor Arpocrate who needed the Roman citizenship<sup>6</sup>.

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1 BENNET (1997), pp. 11-27.

2 BOWERSOCK (1973), pp. 133-140; GNOLI (2009), p. 136.

3 SYME (1936), pp. 189 ss.

4 HARRIS (1964), pp. 3-22.

5 GERMINO (2010), pp. 10-30.

6 GERACI (1995), pp. 59-64.

However Pliny, probably anxious about the doctor's cause, found another problem connected to Arpocrate's citizenship. Since the doctor was Egyptian, he would have obtained firstly the Alexandrian citizenship and then the Roman one, as Roman law had declared. Patiently, Trajan reassured Pliny because the emperor would have given to Arpocrate a letter which had conferred him the Alexandrian citizenship even if it had succeeded the Roman one<sup>7</sup>. In this case, we could observe both the paternalistic behavior and his obedience to Roman law. For these reasons, Trajan was very far from his predecessors, Nero and Domitian; the former was too autocratic with the Senate, the latter was smoothly paternalistic. This kind of paternalism was maybe excessive as Trajan showed in a letter: he was quite vexed because of Pliny's doubts, particularly concerned with the Christian question<sup>8</sup>.

On the 1<sup>st</sup> September 100 Pliny the Younger pronounced an apology of Trajan, also known as *Panegyricus*, in order to thank the emperor because he helped him in becoming consul<sup>9</sup>. This document represents a huge source which gives us a lot of information about Trajan's life and activities. In this occasion, Pliny titled Trajan as *optimus* ('the best') even if this eulogy was given to the emperor only in 114<sup>10</sup>. At the beginning of his government (98-100), Trajan had a relaxed attitude face to the senators: he didn't use *crimen maiestatis* even if he could not abrogate the lex which created it; he confirmed also Nerva's law which avoided death penalty for some senators<sup>11</sup>. He defined deeply severe punishments against its delatores.

For what concerns Trajan's social law, one can notice that it was really hard but it was surely inspired by 'humanitarian principles' which were very diffused among all the jurists.

Trajan realized different interventions in social and political fields and he especially granted a low fiscal pressure to all the Roman social classes. These actions were possible because of Trajan's several conquests which enriched the imperial funds. In *Getica*, Kriton's masterpiece, we can read that the booty values from Dacia were about 5 millions gold libbers, 10 millions silver libbers, slaves and precious crockery<sup>12</sup>. Trajan reformed the death duty (August

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7 *Epist.* 10.5-7. MAROTTA (2009), pp. 43-60, 91 ss.

8 BARNES (1968) pp. 32-50; COSTABILE (2007), pp. 1169 ss.; OLIVIERO NIGLIO (2011), pp. 373-393.

9 CIZEK (1983), pp. 209-220.

10 WOLF (1978), p. 10; LYASSE (2008), p. 338.

11 Dio Cass. *Hist.* 68.1.3.

12 BENNETT (1997), pp. 128-129.

estimated it about 5% of heredity, *vicesima hereditatis*, in increasing exempting hypothesis connected with small fortunes and some of their categories such as *liberi* in potestate and *emancipati*, as brothers heirs of their sisters, as ancestors heirs of their nephews, etc.)<sup>13</sup>.

He also abandoned collationes or *aurum coronarum*<sup>14</sup> that were extraordinary or spontaneous contributions due to the emperor as loyalty. He also confirmed in the fiscal law action, Nerva's *praetor fiscalis*<sup>15</sup>. In this case, Trajan established that every citizen could obtain the possibility of refusing.

Firstly, the emperor obliged senators, without caring about their origin, to invest the third part of their patrimony in Italian goods at least, both to increasing another time agricultural economy, so that Italy could be independent from markets abroad, and for highlighting his prestige toward Italic populations<sup>16</sup>. Trajan forbid slave's witness during trials connected with lese-majesty<sup>17</sup>, in particular against dominions which would have been moved out their leaders political enemies.

According to this humanitarian purpose, Trajan forbid anonymous charges against anybody. The emperor was also a judge: at Centumcelle he met its consilium principis to rule criminal and civil proceedings<sup>18</sup>.

Pliny told us about a special session where Trajan and his loyal counselors decided on crime and civil law cases<sup>19</sup> (e.g. false testamentary and heredity attribution, in interfering with the re-elaboration of the *cognitio principis*).

Trajan's measures tried to upset the Roman social classes welfare. We have recognized just several measures in senators favor. However, Trajan sided with a particular social class (such as represented by *equites*). Trajan certainly followed this social order in endorsing them the role of *publicani* (i.e. tax collectors). Besides, equites became part of the imperial administration; for example, it is possible to remember their agreement to the *consilium principis*<sup>20</sup>.

13 BENNETT (1997), p. 125.

14 Plin. *Paneg.*, 41.

15 D. 1.2.2.32 (Pompon. *l.s. enchir.*); DE MARTINO (1974), pp. 593 ss., PROVERA (1964), p.108 s.

16 PARIBENI (1927), pp. 101 ss.

17 DE LA BERGE (1877), pp. 137-139.

18 CIZEK (1983), pp. 237-244; GUASCO (2017), p. 11.

19 DE LA BERGE (1877), p. 133-135; GUASCO (2017) pp. 11-14.

20 CROOK (1955) p. 50-54; TISSONI (1965), pp. 222 ss. ; TISSONI (1966), pp. 129 ss.; AMARELLI (2015), pp. 11 ss. and 131 ss.

Otherwise, Trajan concentrated his work in favor of poor people in giving them money, food and public games. He gave to the poor people three *congiaria* (i.e. foods and several other things): the first, between 98 and 99, while the other two were promulgated at the end of the wars in Dacia<sup>21</sup>. He also realized the *frumentationes* that is distributions of corn, during the harvest time which was organized by the *praefectus annonae*<sup>22</sup>. The emperor improved Ostia and Pozzuoli seaports<sup>23</sup>. One can also underline those measures that involved all the social classes such as the realization of public works.

Trajan's administration protected with great competence, as Pliny said, all the public works which existed. For example, he knocked down a gallery in the *Circus Maximus* which were reserved to the emperor in order to create 5000 places more than before<sup>24</sup>. Then he built a new aqueduct to supply the zone of Trastevere (*Aqua Traiana*), starting from Bracciano Lake until Gianicolo and the new thermal baths, according to Apollodorus of Damascus project which unified decorative art and some utility concepts<sup>25</sup>. The emperor devoted his energies to the public buildings and he potentiated viability, for example *Via Traiana*<sup>26</sup>.

The main Trajan's social work was represented by the improvement of the *alimenta*, an institution created by his predecessor Nerva<sup>27</sup>. A really exact analysis about these *alimenta* was found in Pliny's *Panegyricus*<sup>28</sup> and *Epistulae*<sup>29</sup> and in Cassius Dio's *Historiae*<sup>30</sup>.

The emperor decided that some land-owners could receive an easy loan (5% instead of 12%) if this field was honestly valued<sup>31</sup>. Interests arrived in the municipal funds directly and not in the imperial ones, through a special bond that was the cure and the education of some selected *pueri* and *puellas*. There are several witnesses which describe the *alimenta* institution. Above

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21 On Dacia's wars, ZERBINI (2005), pp. 1 ss., ZERBINI (2015), *passim*.

22 DE MARTINO (1974), pp. 652-655.

23 BENNETT (1997), pp. 139-140.

24 Dio Cass. *Hist.* 58.7.2.; BENNETT (1997), pp. 143 ss.

25 PARIBENI (1927), pp. 101 ss. LEON (1961), *passim*.

26 BENNETT (1997), pp. 132.

27 SIRAGO (2004), pp. 2-12; LAURENDI (2018), *passim*.

28 25.2-26.1, 27.1-3, 28.4.

29 1.8-10.

30 68.5.4.

31 CRINITI (1991), pp. 261 ss.; PAPA (1994), pp. 61-62.



all, Ulpian's juridical sources remembered how the *alimenta* were allowed to young people until their youth<sup>32</sup>.

Furthermore, especially some famous decorations certificated how children, belonging to the Italic municipalities, enjoyed *alimenta*. Trajan fed all the Italian children in need<sup>33</sup>. Thus, Trajan appointed a commission which could find the deal of children who needed help if the funds were possible (Veleia's table<sup>34</sup>, discovered in 1747 on the Appenninis at Macinesso, near the city of Parma, shows Gallicanus and Bassus, two consular senators). It exists a recollection of two liberalities: the former was about 72 millions sesterces (for 18 boys and one girl) respectively 16 sesterces and 12 sesterces<sup>35</sup>, the latter was about one million sesterces (for 245 boys and 34 girls) obviously according to a 5% tax (the first 3600, the second 52000). Illegitimate children had less money than the others in order to moralize the habits. On one side, this male prevalence would have given a significant increase of the Italic populations, since the army had a lot of soldiers during the struggles against Daci, Nabatei and Parti; on the other side, *alimenta* had furthered small land-owners who had represented the core of the Roman republican economies<sup>36</sup>. By this way, one more time, Italy was the centre of the empire. Besides, Italy was totally independent from the Egyptian corn. Thus, Trajan gave, during a famine, the Italian corn to the Egyptians. Another important food table (CIL. IX.1455) was found at Macchia near to Circello, close to Benevento. The table shows the fields, the contrades and the *pagi* names apart from the loans and the interests. The funds are situated in Benevento and in Nola<sup>37</sup>.

The Triumphal Arch in Benevento well evidences the existence of the *institutio alimentaria*. This monumental arch was built between 114 and 117. It's made of one barrel-vault, 15,60 meters high and 8,60 meters large. On the front, four semi-columns, distributed along the pillars corners, support a pediment which juts out from the barrel-vault. Beyond the architrave, there is an attic which always stands out over the central part, on the barrel-vault; this attic has on the inside a space covered by a fan

32 D. 34.1.14.1 (Ulp. 2 *fideic.*); Hist. Aug., *Hadr.*, 7-8; MAININO (1993), pp. 351-352.

33 CIZEK (1983), pp. 244-251.

34 CIL. XI.1147. Recently DALL'AGLIO, FRANCESCHIELLI, MAGANZANI (2014), where in particular on the *alimenta* CORBO (2014) and MAGANZANI (2014).

35 Lo CASCIO (2000), pp. 308-309.

36 GARNSEY (1968), pp. 367 ss.

37 VEYNE (1957), pp. 81 ss; VEYNE (1958), pp. 177 ss.

vaulted and it is made of by limestone blocks covered with squared marble equal blocks<sup>38</sup>.

On the front we still see a dedication<sup>39</sup>: «To Caesar emperor, Godness Nerva's son, Nerva's Trajan *Optimus Augustus*, German Dacic, *Maximum Pontifex*, invested by the tribunes authority eighteen times, hailed emperor for seven times, consul for six times, Fatherland, the main prince, senate and Roman people».

The barrel-vault internal sides represents a really interesting topic according to our discussion because of two large engraved panels which show some of Trajan's activities in Benevento.

In fact, on the right one observes the *alimenta* institution (symbolized by some pieces of bread put on the central table at the lictors' presence); besides, there is a carved imagine of the the emperor Trajan's coming in Benevento who follows the curator, elected by senates, while distributing the *alimenta* to the children. This scene develops under women motherly glances which symbolize Benevento, Caudium and Liguri Baebiani cities which have become part of the 'Great Benevento project' since 42 B.C.<sup>40</sup>.

On the left, from another perspective, that is moving far from the city, it is possible to appreciate the ceremonial sacrifice in opening *Via Traiana* (one sees Trajan among the lictors during the ceremony<sup>41</sup>). In 109, the emperor decided to built the famous road that linked – though the way was really large – Benevento and Brindisi and it represented a good alternative to the inner and tortuous way which characterized *Via Appia*, whose Horace spoke about: «tendimus hinc recta Benventum<sup>42</sup>». The construction of *Via Traiana* was very hard and for this reason it took almost five years even if preexistent route were fixed too. Miles stones on this road highlight the operations preludes began (Trajan's thirteenth *tribunica potestas*, from 10<sup>th</sup> December of 108 until 9<sup>th</sup> December of 109) while the dedication of the Triumphal Arch in Trajan's honour, which was offered by a part of the senate and by Roman people who lived in Benevento, at the road entrance, dated 114<sup>43</sup>.

The main role of *Via Traiana* was to link Benevento – which divided the

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38 RICHMOND (1969), pp. 229-238; ROTILI (1972), *passim*; LORENZ (1973), pp. 5-53.

39 LORENZ (1973), pp. 10-11.

40 LORENZ (1973), pp. 27-29.

41 LORENZ (1973), pp. 24-27.

42 *Serm.* 5.7.1.

43 BENNET (1997), pp. 138-139.

Tirrenean Sea from the Adriatic one – and Brindisi, a very important seaport, that reached the imperial provinces of the East.

*Via Appia*, from Rome to Benevento and Taranto together with the *Traiana*, its recent and fast variants from Benevento to Brindisi, represents a huge change as the original landscape which belonged to the insider areas of Campania and Apulia particularly corresponding to the modern provinces of Benevento, Avellino, Foggia and Bari<sup>44</sup>. Both the Arch and the *Via Traiana* give us a clear sign of Trajan's goodwill for what concerned the local administration and the political and social issues which improved poor people condition (in particular children). Besides, he simplified the viability along Brindisi, the Oriental door; so he gave much vitality to the economy especially in the inner Sannio zone which was far away from the traditional route of *Via Appia*. For that reason Trajan was called *optimus*, also by the writers of the Late Antiquity.

In conclusion, we can assert that Trajan has been considered the best emperor who has ever existed until the IV century. In fact, Eutropius remembered a particular good omen that the senate pronounced when a new emperor was acclaimed: «*Felicio Augusto, melior Traiano*<sup>45</sup>». Perhaps, no longer emperor who belonged to the Eutropius age than Trajan, gave prestige to the Roman Empire and at the same time consolidated the *pax Romana*.

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44 CERAUDO (2008), *passim*.

45 Eutr. *brev.* 8.5.; LYASSE (2008), p. 329-330.

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# LAW, JUSTICE, AND ARCHITECTURE IN MODERN VENICE: THE RECTORS' PALACES AND THE GOVERNMENT OF THE MAINLAND

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The architecture of the institutions in the Republic of Venice is a topic that deserves deep study and careful consideration. Sculptural and architectural elements, indeed, are important not only because of their artistic value, but also for the role they had in the affirmation of central power. This paper aims to investigate the connection between the territorial expansion, the political and legal system and the architectural heritage in the territories of modern Venice<sup>1</sup>.

The early Venetian ambitions of expansion were directed toward the acquisition of maritime dominions in the Adriatic sea and eastern Mediterranean. Only in the late middle age Venice turned its attention to the mainland. After the occupation of Treviso in 1339, the year 1405 marked the beginning of a rapid conquest: Feltre, Belluno and Vicenza gave themselves to the Republic; a few months later, Verona and Padua too came through conquest under Venetian rule. In 1420 the territory of Friuli was acquired. In 1426 and 1428 respectively the Venetians conquered Brescia and Bergamo; the subsequent war between Venice and the Duchy of Milan, however, lasted for many years until the signing of the Peace of Lodi in April 1454, setting the Western boundary along the river Adda. Finally, at the end of the century, the Venetians came into possession of parts of the Po delta area<sup>2</sup>.

In December 1508 the major European powers, worried by the Venetian expansion, met secretly in Cambrai and decided to enter into an alliance against the Republic. The following year, after the defeat of Agnadello, the Venetian army retreated from the mainland and Venice temporarily lost the territories recently conquered. The war continued until 1516: at the end the *status quo* existing before the conflict was restored almost entirely<sup>3</sup>.

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1 On this topic see the studies carried out by ZUCCONI (1989), pp. 27-49 and VIGGIANO (1996), pp. 529-575.

2 About the conquest of the mainland: COZZI, KNAPTON (1986), pp. 3-98 and MALLET (1996), pp. 181-244.

3 For more details: LENCI (2002); GULLINO (2009); VARANINI (2012), pp. 99-116.

Therefore in the early modern age Venice found itself managing a State in which different cultures and traditions coexisted. In order to enforce direct political control, the central government followed the policy of sending its representatives, called rectors, to the centres of the *Terraferma*.

In the major cities, such as Padua and Verona, there were two rectors who held the role respectively of *podestà* and *capitano*: the former was responsible for keeping social peace, supervising finances, and most importantly administering civil and criminal justice, while the latter was in charge of public order, military defence and the training of troops. In small towns, such as Treviso, Belluno and Rovigo, these functions were performed by a single representative who gathered in his own hands civil, judicial and military duties<sup>4</sup>. The tasks of the rectors were detailed in acts called commissions, by which the elected representatives must swear to abide before they left Venice to take office in the cities of the mainland.

Among the numerous duties of the rectors, the administration of justice was certainly of chief importance<sup>5</sup>: in the exercise of this function, the Venetian representatives were assisted by a variable number of assessors, also called judges. The assessors must be citizens of the Republic, provided with a degree in law and experienced in legal practice<sup>6</sup>.

The means of cooperation between the rectors and their judges varied from city to city. At the beginning of the 18<sup>th</sup> century Gaspare Morari, in his work titled *Prattica de' Reggimenti in Terraferma*, explained that the primary office among the assessors was that of the *vicario pretorio*, the deputy of the *podestà*<sup>7</sup>. In criminal justice, instead, an important role was played by a judge called *giudice del maleficio*, who had relevant duties at each stage of the criminal procedure<sup>8</sup>. The *podestà* and the assessors worked side by side and performed civil and criminal jurisdiction in the cities entrusted to the Venetian rectors.

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4 On these topics see in particular: COZZI, KNAPTON (1986), pp. 205-220; PEZZOLO (1988), pp. 57-65 and BONFIGLIO DOSIO (1996).

5 An overview in PASSARELLA (2014).

6 The role of the assessors in the courts of the mainland has been studied by Povoletto and Viggiano: see *L'Assessore. Discorso del Sig. Giovanni Bonifaccio* as POVOLETTI (1991) and VIGGIANO (1985), pp. 67-74.

7 MORARI (1708), pp. 19-22.

8 This judge had relevant responsibilities: he inspected the crime scene, questioned the offenders, oversaw the use of torture and expressed his vote on the proposed sentence after the *vicario pretorio*; MORARI (1708), pp. 22-28.



For the duration of their assignment (sixteen months on average), the rectors resided in the city they were in charge of governing; for that reason many public buildings were totally or partially renovated and became the residence of the Venetian representatives and their staff. The transformation of public architecture is an element of great importance in order to understand the relationship between Venice and its dominions. In this context, the rectors' palaces, strategically located in the town centre, had a clear political meaning: they conveyed the image of a strong central government by which the capital controlled its dominions<sup>9</sup>.

Another important architectural element was the lion of Saint Marcus, exported from Venice into the whole territory of the State, in the overseas possessions as well as all over the mainland dominions. The spread of the famous symbol has been studied by Alberto Rizzi, whose essays and papers have significantly enlarged our knowledge of the matter<sup>10</sup>. Rizzi noted that in the Venetian dominions the lions were carved or painted with big fangs and accentuated whiskers, in order to make them more intimidating to the subjects of the State<sup>11</sup>.

Unfortunately, only comparatively few originals have survived until today: most of the lions indeed were victims of iconoclastic fury by the enemies of the Republic<sup>12</sup>. The first wave of 'lion hunt' took place during the war of Cambrai: in that period one of the most damaged centres was Feltre near Belluno<sup>13</sup>. Once peace was restored, however, the public buildings were renovated and the spread of the lions became even more pervasive. A second wave took place at the end of the 18<sup>th</sup> century during the Napoleonic wars. The lions' effigies located in the overseas possessions, only slightly touched by Napoleon's extirpations, were partially damaged during the communist era (third and last destructive wave).

The city of the *Terraferma* with the highest number of lions is Belluno, where is also located a wonderful rectors' palace which is now the seat of the prefecture. According to the studies carried out by Marco Perale, the first plan

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9 Zucconi explains that «L'architettura, e in modo particolare l'architettura delle istituzioni, riassume il legame tra Venezia e i centri veneti: nella sua configurazione e nella sua localizzazione, essa incapsula gli intendimenti politici ed esprime, più di qualsiasi altro elemento, le ambizioni dei governanti e le aspirazioni dei governati». ZUCCONI (1989), p. 27.

10 RIZZI (2001-2012).

11 RIZZI (2001-2012), vol. I, p. 34.

12 RIZZI (2001-2012), vol. I, pp. 75-111.

13 RIZZI (1997), pp. 28-30 and 49-56.

to build a palace for the Venetian representatives goes back to 1409<sup>14</sup>. The project involved the enlargement of a pre-existing building and the addition of another one, which would become the residence of the rectors: we find a brief description of this first palace in the famous diaries of Marin Sanudo, who visited the old town of Belluno in 1482<sup>15</sup>. Eight years later, in 1490, a second project was presented: the new construction site opened at the end of the century, but suffered a forced interruption during the war against the League of Cambrai. Construction work was only completed in 1536 under the rectory of Girolamo Arimondo<sup>16</sup>. In the following years the beautiful clock tower, placed at the extreme left of the palace, was also completed<sup>17</sup>.

During the 17<sup>th</sup> century the facade of the palace was decorated with busts and coats of arms of the rectors. Interior spaces too appear meaningful, with particular reference to the great hall on the second floor: it is a room of considerable importance, reflecting the institutional role played by the Venetian rectors in the modern period.

Their assignment was so important that the cities of the mainland usually organized a ceremony celebrating the arrival of the new rector. The predecessor publicly handed over to his successor the symbols of government and made him privately aware of the situation and problems related to the management of the territory. Likewise, the outgoing chancellor informed his colleague on the state of justice and delivered him his case files, a procedure which shows the key role played by jurisdiction in the government of the *Terraferma*. The next morning the new rector met the nobility of the city and went to the cathedral (or to another church according to the use of the place) to attend the religious function. Within the following eight days, he also had to visit the prisoners, if any, and ask their lawyers the reason of their detention and the state of the proceedings. The rector also recommended to the prison's guard a diligent security associated with a human treatment<sup>18</sup>.

Despite some common procedures, there were no strict ceremonial rules: every town indeed had its own customs and traditions. In Treviso, for instance, in the three days following the arrival of the new rector, the famous

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14 PERALE (2000), pp. 14-15.

15 SANUDO (1847), pp. 122-124.

16 PERALE (2000), pp. 31-36.

17 The reference model was the wonderful clock tower erected in Venice in Piazza San Marco between the late 15<sup>th</sup> and the beginning of the 16<sup>th</sup> century. PERALE (2000), pp. 37-41.

18 MORARI (1708), pp. 38-53.

'breast fountain', originally located in the heart of the city near the palace of the *podestà*, poured out red and white wine, from each nipple respectively, which was offered to the people in order to celebrate the new rector<sup>19</sup>.

In this town the palace used as a home for the rectors was built at the end of the 15<sup>th</sup> century: on the upper floor was the residence of the *podestà*, on the lower floor a beautiful *loggia*, known as *Loggia degli Incanti*, with three arches closed by iron gates. In the first half of the 16<sup>th</sup> century an astronomical clock was placed over the central arch. Subsequent restorations radically changed the structure of the palace: the *loggia* was walled up, the clock removed and the building raised<sup>20</sup>.

The city of Padua too organized an official ceremony in order to celebrate the handover between the rectors, as evidenced by the famous painting of Pietro Damini, currently displayed in the town hall<sup>21</sup>. In this painting the focus is on the symbols of power: the rectorial sceptre and the keys of the city lying on the tray held by the young man standing on the right beside the rectors, who are at the centre of the canvas. In the background we can see the facade of the Palazzo del Capitano. Originally the painting hung in the main hall of this palace, one of the most important architectural elements in the cityscape of modern Padua.

This building comprises two sections: the palace of the *capitano* proper in the south wing and the palace of the *camerlenghi* in the north wing<sup>22</sup>, separated by a majestic clock tower. The two sections were built between 1598 and 1605 under the rectory of Antonio Priuli and Stefano Viaro, whose names are mentioned in the epigraphs engraved on the facade of the palace. Both wings are arranged on three levels, marked by series of windows<sup>23</sup>.

Angelo Portenari, in his book *Della felicità di Padova* published in 1623,

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19 NETTO (2000), p. 521.

20 About this palace: ALTARUI (1977), pp. 27-32.

21 The famous painting of Pietro Damini has been recently studied by Franco Benucci: according to the author, the ceremony depicted by the painter represents the handover related to the city of Este between Zaccaria Valier and Lorenzo Foscarini, which took place in Padua on 8<sup>th</sup> December 1629. If the hypothesis proposed by the scholar is correct, the painting would be the last or one of the last works of Pietro Damini, who died in 1631. BENUCCI (2010), pp. 157-202.

22 On the Venetian mainland, the *camerlenghi* were responsible for the collection, the conservation and the distribution of the public taxes. FERRO (1845), vol. I, p. 312.

23 For a detailed study about the construction of the palace: BRESCIANI ALVAREZ (1977), pp. 142-147 and LAMON (2011).

explained that the palace was decorated with the emblems of the rectors sent to administer the city<sup>24</sup>. Thus in the 17<sup>th</sup> century the facade was certainly ornamented with coats of arms and epigraphs; today, however, few remains of such heraldry survive<sup>25</sup>.

At the base of the clock tower is the arch erected by Giovanni Maria Falconetto in the first half of the 16<sup>th</sup> century (1532). A Venetian lion rests on the trabeation over the arch: the current lion is a copy of the original destroyed at the arrival of the French in 1797<sup>26</sup>. Above it we can see the famous clock dial and its astronomical and astrological references: in the centre of the mechanism is the earth, around which the sun and the moon rotate, according to the Ptolemaic system. In the next circles there are the zodiac signs, a blue band with the fixed stars, and a circle marking the hours in roman numbers<sup>27</sup>.

In the city of Padua there are other traces of the Venetian domination, with particular reference to the Palazzo della Ragione, which was the ancient seat of the city courts<sup>28</sup>. Its wonderful hall was entirely frescoed since before the Venetian conquest. At the bottom of the walls are painted the animals marking the seat of each judge: for instance the court of the peacock, who acknowledged extrajudicial agreements, or the court of the goat, who judged the requests for the return of the dowry in case of adultery<sup>29</sup>. In the modern period many lions and other reminders of the Venetian power were carved and painted inside and outside the palace, sometimes obliterating older representations.

As part of the policy adopted after the Cambrai war, a great number of Venetian marks were installed throughout the mainland: in the heart of almost every city centre, for instance, was erected a column topped by a majestic

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24 PORTENARI (1623), pp. 104-105.

25 BENUCCI (2009), pp. 10-13.

26 RIZZI (2001-2012), vol. II, p. 164.

27 BILLANOVICH (1989), pp. 39-66.

28 For a historical and architectural analysis of this palace: VIO (2008).

29 RIGOBELLO, AUTIZI (2008). About the connection between the administration of justice and the pictorial representations inside the palace: GASPARINI (2017), pp. 33-43. In the Padua State Archive are preserved some documents that illustrate a prospect of civil judgments in the XVIII century. These sources explain how justice was administered in Padua in the late modern age, and which kind of disputes were assigned to the rectors, the assessors and the local magistrates: Archivio di Stato di Padova, *Foro civile*, b. 36, P. VI 859, *Prospetto della giudicatura summaria civile esistente all'epoca 1796 p.mo Genn.o* and *Prospetto della giudicatura civile forense che procedeva a p.mo Genn.o 1796*.

lion<sup>30</sup>. Rizzi noted that before 1509 only a few cities had a similar column. Among them was Vicenza: in the second half of the Fifteenth century a column surmounted by a lion was erected in the Piazza dei Signori. The Venetian symbol was destroyed in 1509 by the imperial troops and replaced by the eagle: the lion we see today, survivor of later iconoclastic fury, dates back to 1520<sup>31</sup>.

In Vicenza we can also admire the *Loggia del Capitaniato*, an architectural masterpiece designed by Andrea Palladio in 1565<sup>32</sup>. This *loggia* consists of two levels: a magnificent portico of three arches on the ground floor, and a big hall, frescoed probably by Giovanni Antonio Fasolo, on the upper floor. In the trabeation we can read the inscription «Jo. Baptistae Bernardo praefecto» in honor of the *capitano* Giovanni Battista Bernardo, in charge at that time, who economically contributed to the realization of the palace. This building indeed is also known as *Loggia Bernarda*.

One side of the building is decorated with statues, low reliefs and coats of arms. The two statues on the ground floor, personifications of the cities of Venice and Vicenza, represent respectively naval victory and peace achieved: the work indeed was completed shortly after the victory reported by Venice in Lepanto in October 1571. The other side remained unfortunately unfinished: according to the original project, the *loggia* should have had a greater number of arches, but construction work was interrupted in 1572 and never resumed. Despite this, the Palladian *loggia* contributed to the city of Vicenza being declared Unesco World Heritage Site in 1994.

Another famous architect active in the Venetian mainland was Michele Sanmicheli, also employed by the Republic as a military engineer<sup>33</sup>. In 1533 Sanmicheli designed the new portal of the palace of the *podestà* located in the heart of Verona: this masterful work was celebrated by the art historian Giorgio Vasari<sup>34</sup>.

From 1405 to 1509 a frescoed lion could be seen above the original portal of the palace, but, when Verona was conquered by the imperial troops, it was replaced by the imperial emblem. The task was entrusted to the painter Girol-

30 RIZZI (201-2012), vol. I, pp. 65-72.

31 RIZZI (2001-2012), vol. II, pp. 182-183.

32 VENDITTI (1969).

33 For a list of works carried out by the famous architect as an engineer at the service of the Venetian Republic between 1526 and 1559 see TOSATO (2016), pp. 24-27.

34 VASARI (1855), vol. XI, p. 126. For further details refer to DAVIES, HEMSOLL (2004), pp. 360-361.

amo Dai Libri who, referring to the new insigna, was said to comment: «Durabunt tempore curto». Overheard, he excused himself explaining that the quality of the pigments was so poor that the fresco would not withstand the weather, thus hiding his enduring allegiance to Venice. The painter's prophecy turned out to be true: after the war of Cambrai, the palace was once again the residence of the Venetian representatives, and the imperial insigna was removed<sup>35</sup>.

A few years later the *podestà* Giovanni Dolfin commissioned the architect Michele Sanmicheli to build the new entrance portal. Above the portal was carved another lion, which in 1797 was subject to iconoclasm: the majestic winged lion we see today, indeed, is but an imitation, put there less than a century ago in 1929<sup>36</sup>.

Over the centuries the palace was affected by numerous restorations. In the modern age the facade must have been richly decorated: unfortunately the 'enemy fury' chiselled out not only the lion, but also any other symbol of the Venetian domination<sup>37</sup>.

In Verona there are other architectural elements referring to the Venetian government: for instance, near the palace of the *podestà*, stands another building which was the seat of the most important judicial offices. On the side wall of this palace there is a stone face in bas-relief with its mouth open, in which the subjects of the Republic could secretly put their denunciations; into this particular 'mouth' were delivered denouncements about usury contracts. This method – adopted both in Venice and on the mainland – represented an important instrument in the administration of justice: the phenomenon of secret complaints, described by legal writers in their books, was a characteristic institution of Venetian criminal justice<sup>38</sup>.

In Rovigo too there are references to the Venetian authority. In this city is located an octagonal church, called the *Rotonda*, famous for its pictorial decorations which celebrate the rectors<sup>39</sup>. The *Rotonda* was built between 1594

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35 LENOTTI (1954), p. 14. See also VARANINI (2012), p. 110.

36 Rizzi (2001-2012), vol. II, p. 189.

37 LENOTTI (1954), pp. 10-11.

38 Nowadays other stone faces are preserved in Venice and in some centres of the mainland: in Treviso for instance there is a 'mouth' for secret complaints against criminals, while in Vicenza there is another 'mouth' for denouncements relating to health. On this topic see in particular the studies carried out by Paolo Preto: PRETO (2003), pp. 271-279.

39 BOCCATO, PASQUALINI CANATO (2001). A new monograph dedicated to the famous

and 1606 as a votive temple dedicated to the Virgin. The project was realized by Francesco Zamberlan, a pupil of Andrea Palladio. The church also had an important political role, because here took place the ceremonies for the arrival of the new rector and the departure of his predecessor<sup>40</sup>.

Inside the *Rotonda*, next to the paintings devoted to the Virgin, there is a celebratory sequence which has as protagonists the rectors sent to Rovigo in order to administrate the city between 1619 and 1682. In a painting, for instance, is represented the *podestà* and *capitano* Girolamo Priuli, in charge from December 1619 to May 1621. In this canvas, behind the rector we can see the Adige River, which was a resource for the city, but could also cause damages during its floods: the Venetian rectors in charge of administering the city had to monitor the state of the rivers in order to avoid situations that could become catastrophic<sup>41</sup>. In another painting is depicted Benedetto Zorzi, who ruled the town from June 1654 to December 1655. The rector is represented in the foreground surrounded by four female figures who are the personifications of abundance, justice, virtue and prudence<sup>42</sup>.

Thus, not only architecture, but also painting played an essential role in the celebration of the rectors sent by Venice to the cities of the mainland in the modern period<sup>43</sup>. Another example is the famous canvas painted by Vittore Carpaccio in the first half of the 16<sup>th</sup> century (1517) depicting the entry into Koper of the *podestà* and *capitano* Sebastiano Contarini<sup>44</sup>. The perspective adopted by the artist is that of the bishop Bartolomeo da Sonica who is

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church located in Rovigo was recently published: ROVETTA (2017); for a description of the paintings located inside the Church see in particular TRANIELLO (2017).

40 BOCCATO, PASQUALINI CANATO (2001), vol. I, p. ix.

41 The canvas of Girolamo Priuli is placed in the sacristy of the Church. Boccato, PASQUALINI CANATO (2001), pp. 23-37.

42 Boccato and Pasqualini Canato report Vittorio Sgarbi's opinion that the *Glorification of Benedetto Zorzi* can't be attributed to Antonio Servi, but it is the work of an anonymous painter. BOCCATO, PASQUALINI CANATO (2001), p. 326.

43 The paintings in the *Rotonda* are not unique in their kind: in the Vicenza art gallery, indeed, are preserved a series of paintings originally exhibited in the hall of the *palazzo del podestà*. These paintings, which glorify the good government of the Venetian rectors, were realized in the XVII century. The rectors represented in these canvases are Gaspare Zane, Girolamo Priuli, Alvise Foscari, Tommaso Pisani, Vincenzo Dolfin and Girolamo Bragadin. For further details refer to Musei civici di Vicenza, *Pinacoteca Civica di Vicenza*, II, *Dipinti del XVII e XVIII secolo*, pp. 149-160 and pp. 192-195.

44 See the analysis proposed by FRANCESCUTTI (2005), pp. 128-132 and also the information sheet written by LUGATO (2015), p. 145.



waiting to receive the Venetian representative inside the cathedral. Contarini, who assumed his office in January 1516, is represented in the foreground: the rector stands out from the other figures for his golden coat and the stole on the right shoulder.

On the left side of the painting is depicted the pretorian palace<sup>45</sup>. The building originally consisted of two separate palaces that were devastated by a fire in 1380. During the subsequent reconstruction works, it was decided to join the buildings, since in the meantime the rector gathered in the same person the duties of *podestà* and *capitano*. Sanudo, who visited the city in 1483, wrote in his diaries that he saw the palace still being completed<sup>46</sup>. In the 17<sup>th</sup> century other renovations were carried out: in 1664 the rector Vincenzo Bembo decided to build a battlement and place in the main body of the palace a statue representing Justice. Below this statue there is a lion holding between its two paws an open book with the inscription: «Pax in hac civitate et in omnibus abitantibus in ea»<sup>47</sup>.

The pictorial, sculptural and architectural elements still extant on the Venetian mainland, as well as in its overseas possessions, constitute precious documents in order to investigate and analyse the intricate relationship between Venice and its dominions.

There is a close link between the control of a territory and the architectural policy adopted on that geographical area. The Republic of Venice was no exception: the Venetian conquest, indeed, had significant consequences not only on the political and legal systems, but also on urban planning and, through it, on social history. The decision to build new palaces or to renovate pre-existing buildings is the result of a specific and conscious political choice.

From this perspective, architecture becomes an instrument of affirmation of central government that characterizes the history of Venice from the dawn of modernity until the arrival of the French troops at the end of the 18<sup>th</sup> century.

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45 ALISI (1932), pp. 6-15.

46 SANUDO (1847), p. 148.

47 According to Alberto Rizzi, the facade of the pretorian palace is an exceptional historical document for its inscriptions, busts of the rectors and lions' representations. RIZZI (1990-1991) and also RIZZI (1994).



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MILAN'S COURTHOUSE:  
A VIEW OF THE ROMAN LEGAL CULTURE ACROSS FASCIST IDEOLOGY

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1. *Roman law and fascism era*

History of Roman Law could be studied from different perspectives: Milan's Courthouse and its decorations show the thought of the scholars concerning also Roman law during the fascist period. In Italy, during the regime many of them participated to classicism and Roman revival. Fascism used Roman history and Roman law quite as a mineral deposit<sup>1</sup>. They 'pulled out' values and principles from the *Corpus Iuris* and Latin literature. This was due to the fact that scholars identified some general rules and principles in Roman culture. They thought<sup>2</sup> that these ancient rules were universal and still effective. The best Roman miners were those social, political and cultural movements designed to the affirmation of universal and abstract principles. For example, they chose philosophical elements, such as stoicism tendencies or positive representations of Romans as triumphal conquests.

From these ideals they derived their legitimacy. A good example can be seen in the image of 'Mussolini picconatore'<sup>3</sup>, published in 1935. It symbol-

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1 This is a common metaphor in literature, see e.g. LANDUCCI (1898), p. 311; BRUTTI (2009), p. 80.

2 On the issue of a possible natural law made by Romans there is extensive literature, especially with regard to Cicero and the authors of the imperial age as Ulpian and Paul. For a bibliography on the subject, see SCHIAVONE (2005); GALLO (1999).

3 This image was a famous photograph that appeared on the front page of *Il Corriere della Sera* on 19<sup>th</sup> February 1935, depicting Benito Mussolini with the pickaxe in a hand while beginning the construction of 'Mole Littoria'. The image was so successful that was also copied to the first page of the *Domenica del Corriere*. Its communicative message was linked to the political program of the *dux* and Regime: they wanted to make room for the new, demolishing the previous, but at the same time, they wanted to give light to the ancient. It is the affirmation of classicism and its ties with the Regime. It is an archaeologist, Giacomo Boni, to give birth to this political icon: indeed, he had understood the successful combination of antique and fascism. He got from fascism funding for the excavations and archaeological research. This is the same scholar who identified the fasces that became symbol of the Regime: Cf. SALVATORI (2008). In a letter to a friend, talking about the Lupercal site for which he had put so much effort, he prophetically wrote: «Non sarebbe

izes the work of appropriation of the ‘Roman precious stones’ – to continue the metaphor – made by the *dux* himself and by the fascist regime. Specific events and ideas of Romans were de-contextualized and collected by Fascism as clear examples of the legitimizing of power and the justifying of violence. This is visible, for example, at the triumphal proscriptions, whose importance is emphasised by Mario Attilio Levi in his work *Ottaviano capoparte*, published in 1933. Roman events became models and paradigms for fascist propaganda. Other paradigms were the use of force legitimated by reason of State described by Giuseppe Bottai in *L'Italia di Augusto e l'Italia di oggi*<sup>4</sup> or the ancient concepts of empire and imperialism used in fascist policy to legitimate colonialism<sup>5</sup>. Fascist studies created the myth of fascist Rome following a synchronic approach that neglects chronological data and presents different events as happened at the same time. Mussolini is both a *vir* with republican values and a guardian of the ancient *mores*. Moreover, he is Silla for his dictatorship, Caesar for his *clementia* and military skills, Augustus for his political genius and his imperial project, Trajan for his kindness and care of the needs of people, Constantine for his reconciliation with the Church, and Justinian for his legislative efforts<sup>6</sup>.

## 2. *The role of archaeology and architecture in Roman revival*

Archaeology<sup>7</sup> had a prominent role in classical studies during the fascist period<sup>8</sup>: art historians and archaeologists reinforced the myth of the Roman fascist ideology by providing scientific and authoritative credibility to it.

They made material elements visible: archaeological findings are physically visible and therefore evident in a very concrete way. This physical material-

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male che un giorno S.E. il Presidente Mussolini, in maniche di camicia nera, desse il primo colpo di piccone o scavasse la prima palata di terra». For a detailed reconstruction of ‘Mussolini picconatore’ icon see: SALVATORI (2012) and also MESSINA (2012).

4 SALVATORI (2014), pp. 7 ss.

5 NELIS (2012).

6 This lack of chronological depth is underlined by SALVATORI (2014), pp. 235 ss., but especially by GIARDINA (2000), pp. 248 ss.

7 For bibliography see NELIS (2012), p. 2 nt. 3.

8 We know that the same literary scholars contributed to the recovery of antiquity in fascist key through several scientific and mass publications about characters belonging to the Roman tradition, like Virgil, Horace and Augustus. Cf. NELIS (2012), p. 2 ntt. 5 and 6.

ization has more influence on the masses<sup>9</sup> than literary and epigraphic texts, which are more suitable for an elite public.

During the regime, architecture played a central role in the arts because archaeological excavations, particularly in Rome, are an obvious and integral part of the urban pattern. Archaeological excavations necessarily involved Rome but there were some excavations also in other areas of Italy. Fascism meant to rebuild Italy by imitating ancient models. They generally used both archaeology and architecture to renovate Italy.

Therefore, architecture and urban planning became an essential part of fascist program because they made the ideology theorized by intellectuals and academics visible and effective<sup>10</sup>. Rome was the first and best example of this theoretical and practical program, but also other cities, like Milan, were 're-built' according to this idea.

### *3. The role of architecture and Milan's courthouse*

Milan's courthouse building is an example of the political and cultural influence of 'fascistizzazione' on urban space. It was financed by the government. Although the general plan of Milan (1927) was never completed nor systematically implemented, the realization of the courthouse was not an isolated case. Namely, it can be mentioned the construction of the Triennale's building (1933), where artists made decorations about the labour issue<sup>11</sup>. Milan needed to have a new venue for the judiciary since the seventies and eighties of the 19<sup>th</sup> century. The historical courthouse building in current Piazza Beccaria was inadequate for lack of spaces. This malfunction resulted in a consequent dysfunctional multiplication of offices scattered throughout the city<sup>12</sup>. Planning the new town of Milan, fascist architects and engineers found a building which could be moved or changed near the centre of the town. It was the barracks of Santa Prassede, then called Principe Eugenio, located in Corso di Porta Vittoria. Thus area was chosen for the project. In 1929 the *podestà* Giuseppe de Capitani d'Arzago issued a public competition requiring an idea «semplice e severa che <avrebbe dovuto> rispondere allo

9 GIARDINA (2002), p. 87; MUNZI (2001) e MUNZI (2004); SALVATORI (2013), pp. 236 ss.

10 VIDOTTO (2001); BELLANCA (2003); NICOLOSO (2008).

11 GINEX, SPARAGNI (1996), p. 87.

12 There were venues in Piazza Beccaria, Via Sant'Antonio (Palazzo Clerici) and then the offices of Piazza Missori, Via Montebello and Via San Damiano. GALASSO (2015), p. 10.

scopo cui il palazzo <era> destinato ed essere degno della città di Milano»<sup>13</sup> for the area. However, none of the eleven projects that were presented proved to be satisfactory and, therefore, the announcement was not followed by the construction. The work started only when the new *podestà* Marcello Visconti di Modrone was nominated.

Because of the urgency of the building he turned to a renowned architect. By act of the 3<sup>rd</sup> October 1931 he entrusted the task to Marcello Piacentini. He was an architect and a professor of urban planning at the peak of his career. He was an excellent interpreter of the regime's ideology too. He was a master in making monumental and spectacular buildings. His style recurred to a combination of modern rationalist architecture with classicist recovery. On 5<sup>th</sup> February 1932 he presented the final project. In line with Piacentini's proposal, the building occupied an area of thirty thousand square meters. It had the geometric shape of a trapezoid with the short side overlooking Corso di Porta Vittoria, the diagonal sides Via Freguglia and Via Manara and, lastly, the longest side Via San Barnaba. A special commission was appointed to make the building as much functional and practical as possible. This commission consisted of judges and lawyers who had the task to give practical suggestions to the architect<sup>14</sup>. Piacentini finished his work after eight years and during these years he was assisted by a valuable employee, Ernesto Rapisardi. He oversaw the execution of the whole project. The result was a stately and austere building, which was monumental not only because of its size, but also for its clean and highly geometric style. The palace embodies the architectural ideals of the time: rationality and the purity of shapes, modularity of the interior spaces, recovery of classicism as genuine tradition, social function, and productive relationship with the visual arts, which are iconographic 'an-celle' of the ethical order. This theoretical approach characterized the whole project.

According to Piacentini the new courthouse would represent: «il più grande esempio (...) di un complesso e di una fusione organica di opere d'arte, integratrici di un altissimo concetto architettonico (...) a onore del Regime e di Milano»<sup>15</sup>.

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13 BOLOGNA (1988).

14 GALASSO (2015), pp. 15 ss.

15 PIACENTINI (1939).



#### 4. *The decorations of Milan's courthouse*

The direction of the decorations in the building was directly assigned to the architect. He could choose the artists, the techniques and the themes to be depicted. Between 1937 and 1939 the courthouse was adorned with over a hundred works, including sculptures, frescoes, bas-reliefs and paintings. In the designer's intention, this decorative richness aims to retrieving great pictorial cycles of the Italian tradition. Piacentini and the other artists shared the same goal: achieving art's social function<sup>16</sup>. Piacentini identified four iconographic areas: the biblical, the allegorical, the Roman and then the fascist theme. Among them, the different artists chose their own theme, but they realized their works having in mind a unique decorative cycle crossing the entire building, inside and outside its walls. The artists shared the dream of realizing the social function through the creation of a museum in a public building with a different destination. The aim was to create a building that could be both a courthouse and an art gallery. The courthouse had to be a place where people could learn justice also through the artworks that they could admire in the building. There were different reactions to this ambitious project. The historian of art Raffaello Giolli described this building as «uno strano edificio che sembra messo insieme per potervi passeggiare invece che lavorare: piccole aule, piccolissimi uffici, vastissimi atrii e corridoi. Ambulacri di più di 250 mq per sboccare ad aule di Tribunale di meno di 30 mq (l'aula di udienza più vasta della Corte d'Assise è di circa 90 mq; i cortili di quasi 500 mq per giungere a centinaia di uffici, naturalmente uffici a pareti fisse di 7 mq o pressappoco: insomma una pianta a rovescio»<sup>17</sup>. Even the lawyer Carlo Accetti in 1943 expressed his doubts about the project in an article about the palace, because he believed that the chosen themes for the figurative representations were too monotonous. They were joined by the President of the Court of Appeal Dr. Tito Preda, who criticized the project in 1939: he accused the project of being too much «Judaist» because of the represented themes. Some themes derived from the Old Testament and so they were associated

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16 A paradigmatic summary of the cultural climate is given by PIACENTINI (1937) in which he collects the interventions of artists, architects and writers, both Italian and foreign participants at the workshop organized and chaired by Piacentini. In addition to the same Piacentini report *Le tendenze dell'architettura razionalista in rapporto all'ausilio delle arti figurative*, particularly meaningful for discussion could be: ROMANELLI (1937); SEVERINI (1937); DENIS (1937).

17 GIOLLI (1942).

with the Jewish tradition. He also complained about the excessive size of the works displayed in the classrooms, because they hid the king and *dux*'s portraits and also the crucified Christ.

Piacentini tenaciously fought against them. He turned to the Minister of Education Giuseppe Bottai and to Mussolini himself asking them for help.

Thus, despite all doubts the palace was built and became a fascist symbol of the new idea of Justice. The law became visible through the building. Architecture helped Fascism to create the myth of ancient legal values as archaeological findings helped the regime to create the myth of Rome for the masses.

In spite of the modern rationality of the architecture, the courthouse directly recalls Roman law. This was the virtue of Piacentini, who was able to combine architectural rationalist tendencies to classical tradition. The first was linked to the future, while the second one was connected with the past. In the courthouse of Milan past tradition was not abandoned but it was revitalized.

At the meantime, even the building directly recalls Roman law, his declared modern rationality. Clear and precise geometries are combined with inscriptions on the front side (Corso di Porta Vittoria) of the building. There is an impressive triple gateway to the great hall and the higher part of the pediment was decorated with three Latin inscriptions. These three inscriptions were placed under the word *Iustitia*. Firstly, in the centre it can be read a direct quotation of Ulpian's passage written in the *Digesta*: «Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere»<sup>18</sup>. The second inscription is located on the left side and it is another Ulpian's fragment coming always from the *Digesta*: «Iuris prudentia est divinarum atque humanarum rerum notitia, iusti atque iniusti scientia»<sup>19</sup>. Instead in the third place, there is a quotation of Cicero: «Nos ad iustitiam esse natos, neque opinione sed natura constitutum esse ius»<sup>20</sup>. These quotations are sources that the scientific literature has identified as the 'essential core' to the discovery of a Roman natural law.<sup>21</sup> These sources share an universal feature. They express general principles that are very close to philosophical ideas. They are pro-

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18 D.1.1.10.1 *Ulpianus 1 reg.*

19 D.1.1.10.2 *Ulpianus 1 reg.*

20 Cicero, *De legibus*, I.28.

21 To complete bibliography: MANTOVANI, SCHIAVONE (2007).

duced by jurists and therefore they are not a direct result of political policy<sup>22</sup>. Those who read them cannot recognize a certain political power<sup>23</sup>. Therefore, these fragments are perfect to be re-used by Fascism, as we can see in Milan's courthouse building. Fascist propaganda did not translate them but placed them on the palace. This created a direct link between the fascist regime and the Roman empire. The regime tried to teach people the old values through architecture. In this way ancient ideas became visible and physically present thanks to building.

### 5. Carlo Carrà and Milan's courthouse

Among the figurative works of Milan's courthouse building, the fresco by Carlo Carrà<sup>24</sup> is an interesting example of the connection between art and law. It is located in the Hall C of the Civil Court of Appeals and it was made in 1938.

The judiciary, in particular the President Preda, protested against this fresco because the nudity appearing in this work would undermine the dignity of the court. The location of artworks influences the subject represented: in the iconography designed by Piacentini themes as '*dura lex*' or 'power' are suitable to the Penal Court, while for the Civil Court softer themes are preferred. In the latter, there was an image of the most merciful Justice<sup>25</sup>. This kind of justice was chosen by Carrà for his fresco: he depicted Justinian in the

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22 To analyse causes of technical isolation typical of Roman jurists: SCHIAVONE (2007).

23 Relationship between fascist power and Roman law is well described in SOMMA (2002).

24 The artist was born in Quargnento (Alessandria) in 1881 and died in Milan in 1966. He had a non-school artistic preparation. He devoted himself to landscape painting and composition of nature and simple and basic environments. In the 20s, his first phase is called the so-called 'Primitivism'. He adhered to Futurism, but soon departed from them. In the 30s he embraced the idea of a social painting in the form of so-called 'Arte Murale' (Wall Art) and, therefore, he adhered to the *Manifesto of Mural Painting* in 1933. Subsequently he adhered to the metaphysical ideals, then in his last experience he returned to the landscape with a renewed romantic and feeling lonely. For an essential bibliography about Carrà's life and artworks: CARRÀ (1943); PACCHIONI (1959); RONCHI (1962); CARRÀ (1968); MONFERINI (1994); FAGONE (1996); PONTIGGIA (2004); BANDERA (2012).

25 In addition to Carrà also the artists Campigli and Ferrazzi chose the theme of *clementia* respectively with the works *Non uccidere* and *L'imperatore Traiano si incontra con la vedova implorante giustizia*.

act of freeing a slave<sup>26</sup>. Here the emperor is represented as a simple man, devoid of the typical symbols of power. He is «nudo fra uomini nudi»<sup>27</sup>, sitting, with his right hand raised and his left resting on his knees intent on retaining a roll, symbolizing the law. The artistic depiction, on which the emperor is united in its nakedness with the slave and with two other individuals (on the left side of Justinian), underlines a legal principle. The theme represents freedom as a common condition to all men and therefore as an universal legal principle. The recall is a quotation of Justinian's *Institutiones* where the birth of slavery was a human construction. Slavery was a legal institution made by the *ius gentium* while freedom is the common state of all the men established by natural order: «iure naturali omnes liberi nascerentur nec esset nota manumissio, cum servitus esset incognita»<sup>28</sup>. Fascism wanted to be represented as a guarantee of freedom. For this reason it approved the theme chosen by Carrà. Despite this representation of the ideal of freedom of all individuals as human typical condition, Fascism didn't apply this value. So the artist painted also indirect signs of authority: Justinian is a man among men, but, he is sitting on a purple cloak and he has a golden globe under his left foot, a symbol of his power over the world. He is also shown seated on a chair raised over other subjects represented. These elements are ambiguous: maybe the artist wanted to denunciate fascist policy maybe he believed in fascist power and so he indirectly exalted authority. In any case it is clear why this issue received the applause of the regime: it was intended to adorn the halls of a courthouse, a place where they wanted a visual and real affirmation of the fascist conception of the state, of the power and, therefore, of the administration of justice. Above all, it must show, like civil law, the human side of the regime: close and indulgent towards individuals. The theme also represented the traditional Roman model constituted by *clementia*. It was a *virtus* embodied primarily by Caesar, but also recognized to later emperors such as Trajan and Marcus Aurelius or to the same Justinian, as it happens in this work. It is not a coin-

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26 Even the choice of slavery-tampering issue is placed in a stream of well-defined thoughts because it is dear to the social conception of the masses and it well meets the political and intellectual current that sees in fascism the next development of socialism (remember the same Mussolini's formation). It is no accident that the study of the slave mode of production will become a leitmotiv of Marxists classical scholars or scholars only influenced by Marxism during the half of Seventies. SALVATORI (2013), p. 231, but also, LABRUNA (1965); GIARDINA (2007), p. 18.

27 MAGANZANI (2016), p. 413.

28 *Iust. Inst.* 1.5.pr.

cidence that all these emperors are subjects of other representations in the same courthouse<sup>29</sup>. Fascism recovered positive characters from the past so artist represented all Roman leaders famous for their qualities. The theme recalls Roman classicism, but the structure of the work refers to the best national tradition of painting. The composition refers to *San Lorenzo distribuisce l'elemosina ai poveri*, a Renaissance fresco in the *Cappella Nicolina* in the Vatican, painted by Beato Angelico in 1446. But in the mathematical rigor of the composition it is possible to immediately recognize the traits of Paolo Uccello and Piero della Francesca (Carrà expressly admitted to refer to them)<sup>30</sup>. Turning our gaze to artist's preparatory studies we could find the fascinating interweaving of eras and the combination between art, history and law. That is because the artist followed a path that led him to the simplification and clarification of the composition. He moved, conceptually and theoretically, from the ideal of 'generic' Justice that frees the slaves and punishes the guilty, through the Roman virtue and lastly to the figure of Justinian. Notably by consulting the preparatory sketches related to the emperor, this concept can be proved. There are some sketches made in pencil about different settings of the artwork. The title assigned by the artist to some of them is the following: *Giustiniano: «d'entro le leggi trassi il troppo e l'uano (Dante, Paradiso, Canto VI)»*. The artist of the 20<sup>th</sup> century, the painter of the regime recovered the theme of the Rome's myth embodied by the figure of Justinian quoted in the *Divina Comedia*. He did not read directly a Roman legal source but he used a literary source far from Roman experience. He recognised a universal

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29 Trajan was represented by two artists in two distinct works narrating the same episode of the meeting with the widow. Ferruccio Ferrazza realized with encaustic technique *L'imperatore Traiano si incontra con la vedova implorante giustizia* in the Central Civil Registry of the Court of Appeal on the third floor; it is still visible. It was instead destroyed the fresco painting of Giannino Lambertini dated 1940 *Traiano rende giustizia alla vedova*. Marcus Aurelius was instead represented by the artist Ottavio Steffenini with a fresco made on the backdrop of the classroom section of the II Civil Court of Appeal on the third floor. On it, in addition to the signature at the bottom right, it is possible to read a Latin inscription: «Leges latae; ordinem rectum licentiae iniecit».

30 «Affermati i valori di forma e di colore aggiungerò che mi riesce pure molto utile l'uso della sezione aurea e le regole dei quadranti, dei triangoli e delle diagonali e della croce di S. Andrea, nella composizione del quadro, sia esso di figura come di paesaggio. Ritorna quindi nella mia pittura il Numero, cioè la divisione armonica dei piani e degli spazi come ebbero a manifestare nella loro pittura Paolo Uccello e Piero della Francesca», in CARRÀ, RUSSOLI (1977). This step is also quoted in GINEX, SPARAGNI (1996), pp. 94-95.

value in Roman law because he underlined how the Roman legal paradigm was used during the centuries. The myth of the great emperor revived indeed during the 14<sup>th</sup> century with Dante's masterpiece. Through Roman characters Roman law and Roman values became immortal and universal models. So Roman law and Roman world seem to be like the legendary phoenix which always rises from its ashes. These frescos in Milan's courthouse are a notable, but not isolated example, about how art could be today a new tool to trace the history of Rome and its interpretations. In addition, the immediate visual dimension of the paintings allows the translation of legal concepts and values of the past in a contemporary language.

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## Chapter IV

### Philosophy, Metodology and Construction of the Law



# CICERO'S THINKING ON THE ESSENCE OF LEGAL REASONING

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## 1. Introduction

In previous centuries, in the frame of the civil law system, natural law theory and legal positivism had a significant influence on determination of the nature of legal reasoning. In that sense legal reasoning was based on deduction whereas only one legal solution is possible. Determining legal reasoning as a purely formal logical operation has been deprived of any originality and creativity. That kind of the legal reasoning, still prevailing in continental law, has been denied in different ways and with different success by the doctrine of free law, jurisprudence of interests and topical jurisprudence<sup>1</sup>. Unlike the doctrine of free law and jurisprudence of interests represented by new schools of legal thought, topical jurisprudence is based on ideas created in the classical period. Topical jurisprudence denies the view that legal reasoning operates within a closed deductive system leading to an only one possible solution. On the contrary, legal reasoning is topical reasoning which requires collecting and weighing of all the *pro et contra* arguments of each possible legal solution for a particular legal problem.

Starting point of the renewal of the topics was in 1953 when the legal historian Theodor Viehweg published a book entitled *Topik und Jurisprudenz*. In it, he attacked the view, traditional in continental Europe, that legal decision-making is about deducing decisions on particular cases from the relevant statute. Starting from the Aristotelian statement that his *Topics* provides a method by which we shall be able to reason from generally accepted opinions about any problem set before us, Viehweg claimed that law had in fact to deal with problems which are to be taken merely as starting-points for finding a solution. And the tools for finding these solutions he called *topoi*<sup>2</sup>. His views initiated a discussion which is still continuing.

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1 VODINELIĆ (2012), pp. 152-153.

2 FIVEG (1987), p. 111.

## 2. Cicero's Learning on Topoi

The origin of topics dates back to the classical period where it was closely connected to rhetoric and dialectic. The topics deals with dialectical reasoning or dialectical syllogism, a method of reasoning from commonly held opinions. The founder of topics was Aristotle who in his work titled *Topics* developed a systematic learning of the dialectical reasoning method<sup>3</sup>. Unlike demonstrative or apodictic reasoning which deals with necessary propositions, dialectical reasoning is present in a sphere of probable knowledge which aims at finding the most justified solution of a concrete problem<sup>4</sup>. A paradigm of dialectical reasoning is a discussion between two persons, a questioner and a respondent. A respondent supports a thesis while a questioner tries to deduce the contradictory of this thesis from premises accepted by the respondent<sup>5</sup>. The questioner relies on *topoi* indicating to him which premises are needed for his purpose. His argument as a whole, consisting of premises granted by the answerer and the conclusion contradictory to the answerer's thesis, is called dialectical deduction or dialectical syllogism. The subject of dialectical reasoning is a dialectical problem, which is the name for everything that can be a subject of dispute<sup>6</sup>.

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3 Arist. *Topika* I.1, 100a, 18-21. The *Topika* is often sorted in his logical works. The ancient commentators grouped together several of Aristotle's treatises under the title *Organon* (Instrument) and regarded them as comprising his logical works (*Categories*, *On Interpretation*, *Prior Analytics*, *Posterior Analytics*, *Topics*, *On Sophistical Refutations*). It is usually considered that Aristotle's *Organon* consists of six works including *Topika* taking the sixth place with one third of *Organon* belonging to it. All Aristotelian logical works could be divided into two groups. The first group (*Categories*, *On Interpretation*, *Prior Analytics*) deals with reasoning as such, its elements – propositions and their elements – terms. On the other side, second group of logical works (*Posterior Analytics*, *Topics*, *On Sophistical Refutations*) deals with three kinds of reasoning or syllogism. The difference is based on different character of their propositions. If propositions are necessary, it is about demonstrative or apodictic reasoning. Dialectical reasoning is typical for probable propositions, while false propositions are present in sophistic reasoning.

4 SPRANZI (2011), pp. 104-105.

5 HASANBEGOVIĆ (2005), p. 55.

6 A dialectical problem is «an investigation leading either to choice and avoidance or to truth and knowledge, either by itself or as an aid to the solution of some other such problem (...) The knowledge of some of these problems is useful for the purpose of choice or avoidance; for example, whether pleasure is worthy of choice or not. The knowledge of some of these is useful purely for the sake of knowledge, for example, whether the universe

After Aristotle, Cicero was the one who had a significant impact on further development of topics. His learning of 'places' is mainly expressed in his *Topica*, the paper which is sorted into Cicero's rhetorical treatises<sup>7</sup>.

Rationale for Cicero's *Topica* was is given by Cicero himself in the introduction of the paper. His friend Trebatius, a well-known Roman jurist, found in Cicero's library at Tusculum a copy of Aristotle's *Topika*, and asked Cicero to explain it to him<sup>8</sup>. For a while Cicero hesitated, but finally, while sailing from Velia to Rhegium, he wrote the treatise entirely from memory<sup>9</sup>. Although Cicero did not intend to create a new book on topics but only wanted to interpret the Aristotle's *Topika*, he actually modified Aristotle's learning of *topoi*. In other words, there is a discrepancy between what Cicero was doing and what he thought he was doing<sup>10</sup>. This is so because *the Topics* of Aristotle shows a little resemblance to *the Topica* of Cicero<sup>11</sup>. Main differences between two Topics are as follows:

1. In Book 1 of Aristotle's *Topika*, a detailed theoretical introduction to topical reasoning is exposed. Introductory part of Cicero's *Topica* is very short with an explanation of some basic notions after which he immediately enumerates different kinds of places and arguments;

2. Aristotle's *Topika* is of an autochthonous nature. Therefore, to understand the contents of his work it is not necessary to be acquainted with other Aristotle's works. Cicero's *Topica* contains some notions which could be understood completely only in comparison to relevant notions in other Cicero's works: *De inventione*, *De oratore*, *De partitione oratoria* and the book from the unknown author *Rhetorica ad Herennium*;

3. Cicero supports Aristotle's attitude stating that «every systematic treatment of argumentation (*omnis ratio diligens disserendi*) has two branches, one concerned with invention of arguments and the other with judgment of

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is eternal or not (...) Problems also occur where reasonings are in conflict (for they involve a doubt whether something is so or not, because there are strong arguments on both sides), and also where, because the questions are so vast, we have no argument to offer, thinking it difficult to assign a reason, for example, whether the universe is eternal or not», Arist. *Topika* I.9, 104b, 1-18; See HASANBEGOVIĆ (2005), pp. 20-21.

7 HASANBEGOVIĆ (2005), pp. 127-131.

8 Cic. *Topica* I §2.

9 Cic. *Topica* I §5.

10 HASANBEGOVIĆ (2005), pp. 129.

11 For different hypotheses regarding the real source of Cicero's *Topica* see HASANBEGOVIĆ (2005), pp. 129-130.

their validity»<sup>12</sup>. He further emphasizes that the Stoics were occupied only with the judgment of the validity of arguments which they called dialectic while they completely neglected the invention of arguments. Although he indicates that he planned to elaborate both branches of argumentation, Cicero exposes only the invention of arguments. Unlike Aristotle's invention which is part of dialectic, Cicero's *ars inveniendi argumentorum* is part of rhetoric<sup>13</sup>. In other words, Aristotelian topics, as a method of dialectical discovery of arguments, is narrowed by Cicero to a method of discovery of arguments in the service of the orator. Therefore *Topica* is sorted into Cicero's rhetorical works;

4. Unlike Aristotle who does not define a *topos*, Cicero defines a *locum* in relation to argument. He explains an argument by comparing it with a hidden thing. A relation between an argument and a place is the same as the relation between a hidden thing and a mark showing its hiding place<sup>14</sup>. If one wishes to track down a certain argument, one needs to know the right place (*locum*). Stating that the place is the name Aristotle gives that location from which we can draw arguments, Cicero defines a place as the location of an argument<sup>15</sup>. Cicero's rhetorical approach is reflected in his division of *loci*. The basic division into intrinsic and extrinsic *loci* comes from rhetoric. Intrinsic *loci* are divided into those derived from the thing itself and those derived from its concomitants (circumstances closely connected to the subject under inquiry). *Loci* derived from the thing itself are further subdivided into *loci* of definition, enumeration of parts and etymology. Intrinsic *loci* deriving from concomitants are numerous. Among them *loci* of a genus and a species could be also found in Aristotle's division. But Cicero adds their derivatives, that is to say similarity, difference, contraries, adjuncts, antecedents, consequents, contradictions, cause and effect, comparison according to a degree, circumstances and conjugates<sup>16</sup>. Unlike intrinsic arguments, extrinsic arguments are not invented by the art of an orator. They depend primarily on authority which could be conferred either by nature (virtue) or by time (talent, power, age, one's fortune, practice and others). This kind of argument is usual for oratory because it aims at winning conviction;

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12 Cic. *Topica* II §6.

13 HASANBEGOVIĆ (2005), p. 133.

14 Cic. *Topica* II §7.

15 Cic. *Topica* II §8.

16 ENOS (1996), p. 186.

5. Method of formulation of places is different. Aristotle formulates *topoi* either in the form of advice or in the form of propositions. Cicero's *loci* are not formulated in the form of propositions, but he gives their names next to examples and explanations<sup>17</sup>;

6. In plenty of examples in Aristotle's *Topika*, examples related to law are only exceptionally encountered. Contrary is in Cicero's *Topica*, where *loci* are followed by examples from the Roman law.

Beside a considerable number of differences, there is one important point which brings Cicero closer to Aristotle. It is about Cicero's endeavor to borrow general inquiry from philosophy and implement it to rhetoric<sup>18</sup>. Namely, in Cicero's time, there was a common belief that general inquiries are peculiar to philosophy and dialectic while particular inquiries belong to rhetoric. In his young age, Cicero also shared this opinion. However, in the *Topica* as his mature book, he presents a different view stating that the orator should ignore all individual aspects of a particular case and continue speaking as if it is general examination. In the *Topica*, Cicero exposes a method of treating a case rhetorically on the level of general examination. It seems that Cicero succeeded in reconciling philosophy and oratory but at the benefit of the latter. For Aristotle, topics was the focus of training in dialectic. In Cicero's time, topics was moving away from dialectic and getting closer to rhetoric. Consequently, in such circumstances Cicero not only contributed to the topics moving away from dialectic and its reduction but also made rhetoric more approachable and familiar.

### 3. *Dialectical Nature of Legal Reasoning*

Cicero had a significant interest in legal matters<sup>19</sup>. He emphasized indissoluble connection between oratory and law<sup>20</sup>. Underlining the importance of topics in delivery of a successful speech<sup>21</sup>, Cicero had a great contribution in

17 HASANBEGOVIĆ (2005), p. 144.

18 REINHARDT (2003), pp. 5-6.

19 Cicero himself was taught by two famous jurists, Quintus Mucius Scaevola Augur and Quintus Mucius Scaevola Pontifex. See more BREONE (1978), pp. 49-52.

20 In *De Oratore* (I, 185-92) Cicero presented arguments why the *orator perfectus* should be skilled in law. In *Brutus* (§145), comparing the work of Crassus and Scaevola, Cicero says that Crassus was allowed to be the most capable jurist in the ranks of orators, Scaevola the best orator in the ranks of jurists.

21 In *Orator* (§44-47) Cicero says: «Our perfect orator, then, should be acquainted

bringing topics closer to law.

What was the reason for his strivings to bring topics closer to law?

By the II century b.C. jurists came mostly from senatorial rank. Authority they possessed allowed them to give *responsa* without any justification. On the other side parties and a lay judge respected them simply from the reputation of the issuing person. Jurists formed their legal opinions without any theoretical basis but spontaneously, rested on instructions conveyed by the previous generation of jurists. Turning point in the development of the jurisprudence was introduction of formulary procedure which made the Roman law more flexible and more adaptable to a particular case<sup>22</sup>. Unlike the *leges actiones* which supposed a fix wording that had to be performed correctly by the parties in dispute, formulary procedure was flexible requiring interpretation of a *formula*, a title under which a case could be subsumed in its first phase before the *praetor*. Introduction of formulary procedure corresponds with changes in Roman society. Imposing power over foreign inhabitants, the Romans received many foreign influences which resulted not only in the creation of new relationships but also in altering those which had already existed. In the II century b.C. the Roman upper class started being interested in Greek intellectual achievements<sup>23</sup>. In such circumstances the old mechanism of the

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with the topics of reasoning and argument. For in all matters under controversy and debate the questions which are asked are: Was it done? What was done? What was the nature of the act? The question, Was it done? is answered by evidence; the question, What was done? by definition; the question, What was the nature of the act? by the principles of right and wrong. To be able to use these the orator-not an ordinary one, but this outstanding orator-always removes the discussion, if he can, from particular times and persons, because the discussion can be made broader about a class than about an individual, so that whatever is proved about the class must necessarily be true of the individual. Such an inquiry, removed from particular times and persons to a discussion of a general topic, is called *θέσις* or 'thesis'. Aristotle trained young men in this, not for the philosophical manner of subtle discussion, but for the fluent style of the rhetorician, so that they might be able to uphold either side of the question in copious and elegant language. He also taught the "Topics"-that was his name for them-a kind of sign or indication of the arguments from which a whole speech can be formed on either side of the question. Therefore our orator-it is not a mere declaimer in a school that we seek, or a ranter in the forum, but a scholarly and finished speaker-our orator, finding certain definite "topics" enumerated, will run rapidly over them all, select those which fit the subject, and then speak in general terms» (transl. by H. M. Hubbell).

<sup>22</sup> REINHARDT (2003), p. 57.

<sup>23</sup> ĐURIĆ (2010), pp. 15-19.



*leges actiones* could not provide sufficient protection of infringed interests. Therefore the *leges actiones* were gradually replaced by formulary procedure. On the other side, in the second phase of a trial (*apud iudicem*), public oratory had an ever-increasing influence<sup>24</sup>. Roman jurists had to respond adequately to new challenges of their profession. In order to cope with changes in the legal order a rationalization of legal knowledge was desirable<sup>25</sup>. Remarkable contribution to rationalization of legal knowledge was made by Quintus Mucius Scaevola who in *Ius Civile* (written in eighteen books) discussed also newly created legal institutions (e.g. actions on sale and partnership)<sup>26</sup>. However, Cicero noticed that, in order to give the best legal solutions, actual method of the work of Roman jurists could be improved in a different way. The progress in legal reasoning could be achieved by dealing with a particular case systematically and abstractly. Cicero emphasized the importance of topics in that process. According to him an ideal jurist has to master the art of dialectic<sup>27</sup>. Despite the respect Cicero had for the work of Quintus Mucius Scaevola<sup>28</sup>, in a comparison to the work of Servius Sulpicius Rufus, he gave priority to the latter. Superiority of Rufus was caused by the fact that he, together with Cicero, studied rhetoric at Rhodes<sup>29</sup>. Studying rhetoric by Greek

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24 REINHARDT (2003), p. 56.

25 REINHARDT (2003), p. 57.

26 Unlike the old juristic practice to adjust fixed *leges actiones* and other institutions of the Twelve Tables to the new disputable situations by means of exegesis, a progressive step towards rationalization of the legal knowledge was a discussion of the legal problems of the then time. Beside, Q. Mucius Scaevola tried to categorize and classify legal institutions. See REINHARDT (2003), pp. 57-59.

27 Since the beginning of the 1<sup>st</sup> century BC young upper-class Romans used to study in Athens and Rhodes. Cicero himself studied in Rhodes where he got acquainted with dialectical syllogism. Though he considered himself a representative of the neo-academic school, he was actually a representative of eclecticism developed on the Roman territory. In the theory of knowledge, Cicero supported agnosticism because he believed that nothing could ever be definite or certainly known. What could be reached is only probable, but not reliable knowledge (*aletheia*). Therefore important to him was to reveal something what was the closest to truth. In order to achieve the most probable knowledge all things should be discussed starting from opposite attitudes. See PETROVIĆ (1995), pp. 206-207.

28 Cicero, Rufus and many others were taught law by Quintus Mucius Scaevola. See HASANBEGOVIĆ (2005), pp. 344-355; STANOJEVIĆ (1976), pp. 44-45.

29 In *Brutus* (§151) Cicero says: «About Servius you say well, and I will tell you what I think. I could not easily name anyone who has devoted more attention to the art of speaking and to all other subjects of liberal study than he. As young men we pursued the same

teachers<sup>30</sup>, Rufus accepted a model of dialectical reasoning which he applied to *ius civile*<sup>31</sup>. Cicero thought that the art of topics could help jurisprudence to argue reflectively, in a systematic and abstract way. Therefore the book of *Topica* could be understood as a proposal for a reform of a legal thinking of his time<sup>32</sup>.

#### 4. Conclusion

Topical learning belongs to the roots of the European spirituality, because the founder of the topics is Aristotle. He developed learning about *topoi* within the framework of dialectical reasoning, which does not lead to an absolute, but only to the most probable solution. The significance of the topics in the process of legal reasoning was underlined and developed by Cicero. Considering the time in which Cicero lived and which was characterized by a close link between rhetoric and law, Cicero puts topics in the context of rhetoric and presents his learning about *loci* within the rhetorical skill. There is no doubt that the greatest thinkers who contributed to the development of topical learning were Aristotle and Cicero. However, the difference between

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rhetorical studies here, and afterwards he went with me to Rhodes to acquire a more perfect technical training. Returning from there he gave the impression of having chosen to be first in the second art rather than second in the first. In fact I'm not sure that he might not have been the equal of orators of the first rank; but perhaps he preferred, what he did attain, to be first, not only of his own time but of those who had gone before, in mastery of the civil law» (transl. by G. L. Hendrickson).

30 At the peak of his career Cicero wrote *De Oratore* as a direct reaction to the praxis created by the Latin rhetoricians and teachers of rhetoric with the obvious intention to justify Crassus' edict (promulgated in 92 b.C.) disapproving the Latin rhetoricians. See PETROVIĆ (1995), p. 200; MACDONALD (2017), p. 163.

31 Explanation of superiority of Rufus over Scaevola is found in *Brutus* (§152-153): «Scaevola, and many others too, had great practical knowledge of the civil law; Servius alone made of it an art. This he could never have attained through knowledge of the law alone had not acquired in addition that art which teaches the analysis of a whole into its component parts, sets forth and defines the latent and implicit, interprets and makes clear the obscure; which first recognizes the ambiguous and then distinguishes; which applies in short a rule or measure for adjudging truth and falsehood, for determining what conclusions follow from what premises, and what do not. This art, the mistress of all arts, he brought to bear on all that had been put together by others without system, whether in the form of legal opinions or in actual trials» (transl. by G. L. Hendrickson)

32 REINHARDT (2003), pp. 59-66.

en Aristotle's and Cicero's contribution to the development of the topics is reflected in the fact that Aristotle developed the theory of argumentation, while Cicero put an emphasis on learning about arguments. From the 'Age of Reason' there has been a tendency to apply a method of natural sciences to social sciences. Therefore, topical approach to law is dying away because it is suppressed by an axiomatic-deductive approach. The restoration of topical thought comes in the mid-20<sup>th</sup> century when Theodor Viehweg publishes the book *Topik und Jurisprudenz*. Since then, the essence of legal reasoning has been re-examined in the light of topical reasoning that does not lead to an only one, but only to the most favoured solution.

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# INTERPRETING THE ANTIHERETICAL EDICT OF WIELUŃ. BETWEEN LITERAL MEANING AND PHILOSOPHICAL APPROACH

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## 1. *Introduction*

King Władysław Jagiełło was born a pagan but converted due to his marriage with Queen Jadwiga as well as the title to the Polish crown. He was also a first ruler of Poland to announce law against heretics. This act known as Edict of Wieluń, published in 1424, stated that everyone who shared heretical beliefs made an offence against the majesty of the crown. As it is deduced from the act, its primary objective was to subdue the Hussite movements, which started in neighbouring Bohemia in 1419. Nonetheless, the outbreak of new heresy was subsequently a unique opportunity for Polish international policy to diminish pressure posed by emperor Sigmund of Luxembourg and Teutonic Order<sup>1</sup>. For these reasons, the way how the problem of heresy in Poland was solved brings on disputes among legal historians.

Seeing as king Władysław had an exceptional spiritual biography and an ambiguous stance towards Hussite Bohemia, some historians claimed that Edict of Wieluń was stripped of its binding force or ineffective at all. Also, the evidence for Polish persecution policy against heretics is scarce so that Ewa Maleczyńska concludes that ruling class in Poland has sympathy for Bohemian unorthodoxy<sup>2</sup>. By this reason, the edict was nothing more than a political declaration produced to meet the expectations of Pope Martin V and the international community.

Nevertheless, the inquiries held through last two decades entirely refuted such opinions since they were built upon superficially gathered sources and lacked basic biographical research. In the opinion of Stanisław Bylina, there is no possibility to negate the fact that fighting against heresy was a part of public policy in the Kingdom of Poland even so we cannot presume that it was a reason why an unorthodox belief had not settle down in the country at that

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1 PROHASKA (1908), vol. 2 pp. 62-144; FROST (2015), pp. 136-138.

2 MALECZYŃSKA (1959), pp. 398-402 and 423-426.

time<sup>3</sup>. Alternatively, for Paweł Kras is evident that secular arm participated in the oppression against Hussites and subsequently, the efficacy of its legal basis as Edict of Wieluń shouldn't be doubted<sup>4</sup>.

By any means, we cannot ignore Kras's reasoning since he supports his opinions with a few examples of serving a death penalty to the heresy believers in late 15<sup>th</sup> century<sup>5</sup>. Even so, such ideas lost their plausibility when we know that Edict of Wieluń was the only Polish legislation against heretics and was still in force during the successful spread of Lutheranism in Poland one hundred years later. By what miracle it would lose its effectiveness after hundred years? Also, how could it be possible that Polish policy changed so drastically that it was known as a shelter for every sort of heresy in 16<sup>th</sup> century and finally founded Warsaw Confederation Act in 1573<sup>6</sup>? Let us diligently research the text and try to confront it with philosophical output made by Polish scholars from that time.

## 2. *Textual Meaning*

The edict was announced on 9<sup>th</sup> April of 1424 and was the result of an extensive work shared between clergy, the crown and nobles from the most critical lands of the country: Lesser and Greater Poland (the meetings were respectively in Nowy Korczyn and Wiślica). Technically, it was formulated as an answer to the demands made by the Polish clergy which were expressed during the synod held in Łęczyca. Nonetheless, the international pressure to establish such law was undeniable as we can find letters from the Pope, the Emperor as well as aristocracy from Reich and Hungary which urged Władysław Jagiełło to act against Hussites<sup>7</sup>. It is widely assumed that the authors of the law were: bishop of Cracow Zbigniew Oleśnicki, a prior of Cracovian Dominican monastery Jan and two inquisitors Jan Brascatoris of Wrocław as well as Stefan of Cracow. Still, the legislation process must have somehow influenced the text thus we can safely presume that it expressed views shared by most of the Polish ruling class.

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3 BYLINA (2007), p. 177.

4 KRAS (1997-1998), pp. 75-77.

5 KRAS (1997-1998), p. 76.

6 LECLER (1964), pp. 384-418.

7 See respectively: *Codex epistolaris saeculi decimi quinti*, vol. 1, part 1, pp. 52-53; vol. 2, nn. 112 and 119, pp. 147-150 and 157.

The mentioned assistance of inquisitors might be a reason why the act based upon imperial regulations such as Bohemian *Maiestas Carolina* and antiheretical decrees of Frederic II, especially one from 1220 and 1232 made for the German part of the Holy Roman Empire<sup>8</sup>. Inspired by them, Edict of Wieluń introduce to the Polish statutory legal system a Roman construct of *criminae lesae maiestatis* for which every heretic is condemned. In fact, this legislation was nothing more than an implementation of common rules used by canon law and known widely in western Europe like establishing confiscation of all property had by a heretic, depriving them of civil status and proclaiming infamy. For these reasons, Edict of Wieluń is also assumed as the first Polish statutory guarantee of secular assistance in ecclesiastical judiciary matters<sup>9</sup>.

On the other hand, it was proved by Karol Koranyi that the proclamation was prepared only to resolve current problems mainly caused by the unauthorised expedition to Bohemia made by king's nephew, Zygmunt Korybutowicz<sup>10</sup>. Because of this, most of its precepts relate to subjects who stayed in Hussite Bohemia to force their return to the country until 15<sup>th</sup> July of 1424 as well as to submit themselves to the ecclesiastical jurisdiction. The same went on with people who travelled there after the estimated term. Also, the edict banned trade relationships with Hussites and emphasised illicitness of selling military goods such as weapons, food and lead used to forge cannon missiles.

As we can see Edict of Wieluń was not supposed to establish general rules against any heresy which could emerge in Poland but was proclaimed as a solution only to the Hussite threat. For this reason, it has inspired many interpretational problems as well as hindered efforts which were put to describe the public religious policy in the fifteenth century Poland.

It could not be otherwise, if the proclamation does not provide any definition of a heretic at all, but only suggest its Bohemian origins. Even so, we could assume that such explanation wasn't necessary at that time since it was a natural matter of religious interests and should be regulated by canon law. However, such presumption could not stand the fact that ecclesiastical jurisdiction was then vigorously disputed by the nobility and local powers in Poland. As a result, the ambiguity was so severe that its consequences might plausibly invoke conflicts between two authorities. Besides, Edict of Wieluń

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8 KORANYI (1930), pp. 324-331.

9 WÓJCIK (1960), p. 76.

10 KORANYI (1930), pp. 324-325.

was unprecedented by any other secular laws, and it must have invoked the same troubles concerning the practice connected to the act.

What is more surprising, there is also a critical loophole relating to the punishments proposed by the act since we can read that heresy in general is: «velut Regiae Maiestatis offensor capiat, et iuxta exigentiam excessus sui puniatur (...)»<sup>11</sup>. For Karol Koranyi this term is not obvious as the expression *iuxta exigentiam excessus sui puniatur* could be intentionally vague to bestow upon the crown more freedom to choose a punishment<sup>12</sup>. Alternatively, Paweł Kras argued that the same phrase was used a few times by statutes of emperor Frederic the Second and usually meant a death penalty<sup>13</sup>. Nonetheless, it is hard to believe that such ambiguity was left accidentally since the supposed sources of the edict expressed the thing quite explicitly.

Furthermore, it corresponds with the political situation under the reign of Władysław Jagiełło who had to balance influences of different aristocratic parties as being a sole ruler of the Kingdom of Poland without legitimate rights since the death of his wife queen Jadwiga in 1399. By this reason, Edict of Wieluń was consulted, then announced with formal approval of nobility along with clergy and even backed by a union organised to suppress heresy. Significantly, an act which established this confederacy also did not provide any new details about penalties as it only claimed: «Iuxta criminis ipsorum qualitatem dignas penas, ut aliis prodeant in exemplum infligere, imponere et irrogare»<sup>14</sup>.

Described tendency to not prescribe specific punishments for persons who shared heretical beliefs was plausibly opposed by the king who expressed few times his will to punish such perpetrators by *cruentam gladii saevitiem aut flammaram horridam voraginem experti fuissent* if such cases had been under his jurisdiction<sup>15</sup>. The phrase is most bewildering when it will be compared with provisions made in Edict of Wieluń since we can suppose that royal authorities had the utmost competence to decide about a penalty served to a heretic<sup>16</sup>. Nonetheless, we could safely presume that Władysław Jagiełło was

11 *Vladislaus Jagello contra hereticos et fautores eorum in Wieluń constituit*, p. 38.

12 KORANYI (1930), pp. 326-327.

13 KRAS (1997-1998), pp. 66.

14 *Codex epistolaris Vitoldi Magni Ducis Lithuanie*, n. 165, p. 654.

15 *Codex epistolaris saeculi decimi quinti*, vol. 1, part 1, pp. 148-149

16 *Vladislaus Jagiello contra hereticos et fautores eorum in Wieluń constituit*, p. 38:

«Ut cuicumque in Regno nostro Poloniae et Terris Nobis subiectis hereticus, aut heresi infectus vel suspectus de eadem, fautor eorum vel director repertus fuerit, per nostros



slightly sympathetic to the ecclesiastical opinions as his personal view corresponds to the precepts expressed by constitutions of Fourth Council of the Lateran and Polish Statute of Mikołaj Trąba made in 1420.

Such inconsistency between secular and religious regulations might look unfamiliar since clergy not only was consulted through codification process, but the bishop and the inquisitors also did write Edict of Wieluń. However, some assumed it was caused by the translation made from *Maiestas Carolina* since it extended public power beyond traditional borders<sup>17</sup>. Additionally, we could also speculate that such precepts were made under the pressure of Polish nobility who then struggled to limit the jurisdiction of ecclesiastical courts from criminal cases which were finally settled in 1437<sup>18</sup>.

Although, it is more credible that the supposed incoherence was just a result of misleading interpretation which believed the edict dealt with heresy single-handedly as it regulates some matters differently than canon law. All in all, lack of denomination for heresy and a heretic as well as defined penalties could be caused by the fact that the edict only obliged secular authorities to assist with the oppression according to local religious regulations presented in aforementioned Statute of Mikołaj Trąba. Even though there are no direct premises for such opinion, it is worth considering.

### 3. External Consistency

It shouldn't be a surprise that Polish episcopacy momentarily responded to pleads made at the Council of Constance by Pope Martin V to produce legal instruments necessary to fight against new heresy. Among other things, it was a reason for archbishop Mikołaj Trąba to organise two synods in Wieluń and Kalisz which concluded in 1420 with comprehensive legislation of Polish canon law, named after the inspirer Mikołaj Trąba's Statute.

Antiheretical rules are comprised of two canons titled *De hereticis* and *Remedia contra hereticos*. First one, which introduced general precepts about heresy, was borrowed from two canons: *Heretici quarumcumque* as well as *Contra Christianos* of Bohemian Statute of Arnošt of Pardubice announced in

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Capitaneos, Consules Civitatum, et alios Officiales ac quoslibet subditos nostros sive in officis, sive extra viventes, velut Regiae Maiestis offensorcapiatur, et iuxta exigentiam excessu sui puniatur».

17 KORANYI (1930), p. 324; *Maiestas Carolina*, pp. 77-81.

18 See ULANOWSKI (1887), pp. 32-49.

1349. The base source for *Remedia contra hereticos* is still questioned, even so, we could safely assume the personal view of the archbishop influenced the canon. In contrast to *De hereticis*, it is mostly occupied with detailed precepts concerning the direct threat of Hussites, for instance: prohibiting priest and preachers to act outside the prescribed territory of one diocese or establishing special procedures to expose and punish followers of Jan Hus's doctrine.

Following the previous approach, we will give more attention to canon *De hereticis* as it could provide us with more details about public stance to heresy in general. Even though it could have seemed that we will find there a directly formed denomination of a heretic, the regulation served other purposes, and such definition could only be a result of accurate interpretation.

Significantly, legislator addresses its first part *Heretici quarumcumque* to the faithful Christians and states that every heretic, as well as anyone who supports them, are excommunicated. What means that any ritual to announce such information was not necessary since such believers exclude themselves from the Christian community. For this reason, we could assume that the precept was established to demand from faithful believers to inform about any suspicious practices and opinions regardless if they were, in fact, orthodox or not. It proves that ecclesiastical authorities were most careful in the case of heresy and purposely didn't define the term. Even so, such regulation must have caused with a lot of pointless trials like the one described by Stanisław Bylina where a noblewoman Anna Radecka suspected mostly everyone including her relatives for being a Hussite, but she could only recall an unorthodox opinion of her mother-in-law<sup>19</sup>.

Differently, *Contra Christianos* regulate matters which at first glance not directly corresponds to the problem of Heresy as it deals with apostasy. What is more confusing, Statute of Mikołaj Trąba also dedicated a particular canon to the same problem, *De apostatis*. As we can read, *Contra Christianos* orders that Christians who abandoned their faith must be treated in the same way as heretics. For that reason, it could be assumed that legislators placed such provisions close to *Heretici quarumcumque* since they had the same functional motives tending to inform about the excommunication of perpetrators. It also corresponds to the position where a paradigm rule for both Arnošt of Pardubice Statute as well as Mikołaj Trąba's Statute was set in the title *De Hereticis of Liber Sectus*.

Still, such presumptions couldn't omit the fact that *Heretici quarumcu-*

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19 BYLINA (2007), p. 173.

*mque* did not establish any penalties for sharing heretical beliefs in a precise way, but only wanted Christians who behave like heretics or were suspected for heterodoxy were excommunicated. In the same way, we should read the whole passage of *Contra Christianos*:

«Contra Christianos, qui ad ritum transierunt vel redierunt Iudeorum aut gentilium, qui dum erant infantes, aut mortis metu, non tamen absolute seu precise coacti baptizati fuerint, est tamquam contra hereticos, si fuerint de hoc confessi aut per Christianos seu Iudeos convicti, et sicut contra fautores, receptatores, et defensores hereticorum taliter est procedendum»<sup>20</sup>.

The fragment might impose some difficulties since its meaning is somewhat unclear and the most straightforward translation indicates that it concerned apostates but excludes those who were baptised as children or compelled by death or force. Significantly, in comparison to the original text either from *Liber Sextus* or Statute of Arnošt of Pardubice the fragment lacks essential passage: «Etiam si huiusmodi redeuntes dum errant infantes aut mortis metu». Is it possible that Polish canon law could deliberately alter the meaning of common regulations to discontinue a policy which accepted forced conversions<sup>21</sup>?

Such theory could also be supported by the described composition of the whole canon *De Hereticis* since we can assume that the first part signified a general behavioural rule towards heretics and the second one simultaneously extended such provision by apostates and made an exception for people who haven't been baptised willingly. Thus, we could argue that Polish ecclesiastical authorities informed orthodox believers that oppression is served only against those who abandoned the Catholic Church as a result of their free choice.

Even so, such revolutionary modification must find some theoretical foundation which could justify its orthodoxy and at the same time made it plausible to exist when the statute was written<sup>22</sup>. In fact, such views were present at public discourse in Poland under the rule of king Władysław Jagiełło as well as their representatives took part in drafting Statute of Mikołaj Trąba in 1420.

20 *Statuty wieluńsko-kaliskie Mikołaja Trąby z 1420 r.*, p. 95.

21 *Liber Sextus* 5.2.13; *Pražské synody a koncily předhusitské doby*, p. 153

22 See caput *Ne conversi ad fidem de Iudaeis veterem ritum Iudaeorum retineant* in the Fourth Council of Lateran: «ut quos christianae religioni liberae voluntatis arbitrium obtulit, salutifere coactionis necessitas in eius observatione conservet», *Conciliorum Oecumenicorum Decreta*, vol. 1, p. 242.

#### 4. *Substantive Opinions of Legal Doctrine*

The doctrine was known as Cracovian School of International Law hence it was built upon the conflict with Teutonic Order, and their primary purpose was to deny its rights to Samogitia as well as other lands taken from pagan peoples. Even though it is usually identified with Paweł Włodkowic who was a legal representative of Poland at the trial held on the Council of Constance, there were other notable members like Stanisław of Skarbimierz and Andrzej Łaskarzyc of Gosławice. These two scholars are widely assumed to play significant roles during the works on the Mikołaj Trąba's Statute, from the synod in Uniejów in June 1414 till the assembly in Kalisz in September 1420<sup>23</sup>.

Stanisław of Skarbimierz studied in Prague where he received a doctorate from canon law in 1396. Then he returned to Cracow and took part in the renovation of the University of which he becomes the first rector after the reopening in 1400. He was famed for great rhetorical abilities and left more than one hundred speeches among which some related to the problems of coexistence between Christians and infidels<sup>24</sup>.

The most known is the sermon *De bello iusto et iniusto* made by the author to argue for the interests of Polish Crown and its right to form alliances with pagans during the war with Teutonic Order. Presumably, the one fought in 1409 to 1411. In the opinion of Krzysztof Ożóg, the speech was given in 1410 at Cracovian court in the presence of Bohemian king Wacław IV but was also plausibly addressed to Polish knights<sup>25</sup>. Because of the topic, it additionally describes the scholar's attitude to the interreligious matters.

According to the text, peace is assumed a substantial value which equals life itself because it allows all things to grow opposite to the war times when everything rots. As a result, Stanisław of Skarbimierz claimed it is a natural right for each God's creation to live peacefully and to restore such harmony when it was disrupted, even using a force to do so. If such privilege is entitled to any being, even more, the whole humanity deserves it by natural right and provisions of *ius gentium* regardless the faith. Additionally, the war itself is just only when it is fought to restore peace or to preserve it even if it is fought side by side with pagans against Christian state. For the same reasons, also pagans are protected by international rule and can justly defend themselves

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<sup>23</sup> See DZIWIŃSKI (2014), pp. 4-14.

<sup>24</sup> EHRILCH (1955), pp. 3-5.

<sup>25</sup> OŻÓG (2009b), p. 3.

from any aggression and fight to defend their independence. Consequently, they have the same rights to statehood as any Christian nation, and there is no authority which could deprive them of such claim<sup>26</sup>.

Just as the previous one, *Revocatur in dubium* also concerns alliances with infidels against Christians, whereas the reasoning is much more nuanced as it relates specifically to heretics only. For this reason, some scholars identified its author with Stanisław of Skarbimierz even so it isn't a speech but a legal opinion. According to Wojciech Świeboda, it was written after 1422 when international pressure on Władysław Jagiełło was at its peak as a result of the first expedition of Zygmunt Korybutowicz<sup>27</sup>. Therefore, we can speculate that *Revocatur in dubium* would have affected attitudes towards heresy throughout the works on Edict of Wieluń, even if Stanisław of Skarbimierz wasn't its author.

Apparently, the opinion starts with a distinct remark that heretics are aggressors against the Church and every king has a responsibility to protect orthodoxy from their malicious influences. Nonetheless, the peace is so essential that he also must use each possible mean to preserve it even so it would be an alliance with heretics. As all human beings have the same title to live peacefully, the Church forbade to expel any infidels from their homes or to oppress them without reason violently. All in all, heretics also benefit from the salvation and the war fought by Christianity against them last as long as it is a necessary protection for the faithful believers<sup>28</sup>. Thus, we can conclude that heretical state has the same right to exist as any other if it is not aggressive against Christians and don't spread its ideology across the borders.

Differently, the ideas shared by Andrzej Łaskarzyc were not so theoretical as he was focused on its practical aspects which can be read from the judicial records made during legal proceedings held before Benedict Makrai from 1412 to 1413<sup>29</sup>. Before his opinions are described, let us share some facts from his biography.

Andrzej Łaskarzyc initially studied in Prague until 1392, and after a short, brilliant career at Cracovian Court, he continued academic work in Padua from 1402 to 1405. During this time, he managed to meet Francesco Zabarella, Piero d'Anchorano, Proscido Conti and befriend Paweł Włodkowic which proved

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26 Respectively, the paragraphs 29, 32, 33, 38 and 39 in EHRlich (1955), pp. 128-134.

27 ŚWIEBODA (2013), p. 158.

28 Respectively, the paragraphs 1-6, 12,13 and 14-17 in EHRlich (1955), pp. 198-202.

29 *Lites ac res gesta Polonos ordinemque Cruciferorum*, vol. 2, pp. 88-351. See also ŚWIEBODA (2013), pp. 160-168.

very beneficial during further work as he became elected a bishop of Poznań. What happened just before Council of Constance in 1414 since his election was meant to strengthen Polish delegation and he did it stunningly well<sup>30</sup>.

We can hardly deduce any systematic theory of Andrzej Łaskarzyc from the mentioned proceedings. Nonetheless, it is possible to point out some significant ideas of his reasoning. Firstly, he vigorously argued that infidels have the same right to property as Christians, also that any attempt against their title is unjust<sup>31</sup>. Significantly, he emphasised a few opinions of Gratian who claimed that there is no legal disequality based on faithfulness to the Church as well as that *servitia coacta Deo non placent*<sup>32</sup>. He explained them by a biblical paraphrase that no corporal sword shouldn't be used to brought infidels to Christ then a spiritual sword made from the word of God<sup>33</sup>. It is also much more efficient, in the opinion of Andrzej Łaskarzyc, to Christianize using peaceful ways at least in comparison to the efforts of Teutonic Order.

Both scholars similarly built their views upon authoritative opinions of other canonists as well as positively avoided any assumption which could solely base on their convictions. For this reason, the works are very learned, and it is nearly impossible to charge them as unorthodox, even if the authors present an innovative interpretation for such sources as Gratian's *Decretum*, the *Decretales Gregorii IX* and the opinions made by Raymond of Penafort, Oldradus da Ponte, Giovanni d'Andrea or finally Pope Innocent IV. This last work known as *Apparatus* was the essential element of their argumentation since the Pope elaborated the previously mentioned rules of *ius gentium* towards infidels and their right to independent statehood<sup>34</sup>.

Nonetheless, mentioned pieces were also strongly influenced by local theological movements named as *via moderna* which originates from University of Prague before the outbreak of Hussite revolution in 1419. As it was stated before, both Stanisław of Skarbimierz and Andrzej Łaskarzyc studied there until they commenced their public career and the same goes for almost every leading member of the ecclesiastical hierarchy in the Kingdom of Poland at that time<sup>35</sup>. Each of them undoubtedly met Matthew of Cracow who was teaching

30 KRZYŻANIAKOWA (2001), pp. 265-278.

31 *Lites ac res gesta Polonos ordinemque Cruciferorum*, p. 295.

32 *Decretum Gratiani*, c. 5, *de Poen.*, d.2. The second rule is attributed to St. Augustin.

33 Eph. 6,17 and Heb. 4, 12.

34 Innocentius IV, *Apparatus*, pp. 505-510.

35 For Krzysztof Ożóg, nearly one thousand Polish students attended to Prague before the year 1409. See Ożóg (2008), pp. 422-423.

arts in Prague until 1396 who also took part in the renovation of University of Cracow from 1398 to 1399. His theological works are sometimes claimed as representative opinions for a Bohemian form of *devotio moderna* since he strongly opposed an idea that separation from the world is the only way to pursue salvation. Therefore, he emphasised on spiritual development and morality over obeying legal rules as it is more important to serve God willingly<sup>36</sup>.

The new religiousness which focused on personal practices could have a significant effect on political and legal stances shared by Polish higher clergy as well as the policy of the Kingdom to some extent. As a result, we should not deny that the previously described opinions influenced the way how the religious law was enforced in the Kingdom of Poland.

### 5. Conclusion

Finally, we can try put all pieces together and reconstruct the doctrine towards infidels, including heretics, which plausibly originate directly from the previously described concept of just war. The state primary duty was to defend the internal peace as it allowed its subjects to pursue salvation undisturbed by temptations of war. Such order can be established only on legal foundations which free communities to live according to their religions as well as traditions so long as they didn't pose a threat to the Catholic Christians by any proselytism.

For example, the canon *De schismaticis* of Mikołaj Trąba's Statute prohibited priests from Eastern Orthodox Church to minister their liturgy or build their churches outside the borders of their traditional lands, but in the same time didn't treat them as excommunicated<sup>37</sup>. The only purpose of these provisions was to avoid any conversion from Catholicism to Orthodoxy, which also corresponded to the public policy of the Crown as Orthodox noblemen had the same rights as Polish knights<sup>38</sup>.

Consequently, heretics were condemned by their own choice as they in fact excommunicated themselves from the Catholic community, even so, the oppression was related to their proselytism like it was described in the eight precepts of *Remedia contra hereticos* which took a particular interest to

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36 See BIELAK (1999), pp. 43-49.

37 *Statuty wieluńsko-kaliskie Mikołaja Trąby z 1420 r.*, pp. 96-97

38 See CZERMAK (1903), pp. 348-405



prevent the spread of new doctrines<sup>39</sup>. For this reason, we can safely assume that the meaning of provision *Contra Christianos* was modified on purpose as it guaranteed the religious peace in the country without danger of forceful conversions.

Therefore, there was no conflict between persecution and international politics in the Kingdom of Poland since it is a duty for a king to be allied with all possible friends to restore the peace of the realm. Although heresy itself posed a serious threat to the social order and in consequence public harmony, so Władysław Jagiełło and the episcopacy established the rules primarily to prevent the problem.

For this reason, Edict of Wieluń didn't intend to define the group to be oppressed as its primary purpose was to deal with a particular peril of Bohemian Hussites by restricting any connections with them and their country. Moreover, such generalisation served as a referral to the canon *De hereticis* and *Remedia contra hereticos* where ways to deal with heresy were described in a more detailed manner.

What is most intriguing, the bishops had the utmost competencies to oppress new heterodoxical doctrines according to Mikołaj Trąba's Statute. Such legal solution significantly differed from Western Europe, and thus it allowed the ruling class to adapt their policy against heretics according to the demands of internal and external affairs. It was possible because the cathedral chapters seemingly elected all of the bishops, but in fact, they must have been accepted by the Crown. As a result, they were semi-independent participants of the national political scene who usually supported primary interests of the realm above the international papal pressure<sup>40</sup>.

Nonetheless, we should not believe that the persecution policy against Hussites didn't exist in Poland as such assumption would be made on the contrary to the available evidence. Naturally, the oppression was much milder than the same held then in France or Germany since it might have flexibly adapted to the demands of the so-called *raison d'État*. For this reason, it could have been drastically modified during 16<sup>th</sup> century to the extent when a writer Stanisław Witkowski described Poland with words: «When anyone bowed here, then that Eagle (of Poland) shelter them with his wings»<sup>41</sup>.

39 *Statuty wieluńsko-kaliskie Mikołaja Trąby z 1420 r.*, pp. 94-96.

40 DZIWIŃSKI (2015), pp. 13-25 and 31.

41 In Polish: *Gdy się kto tu skłonił, każdego swymi skrzydły ten Orzeł zasłonił*, in HERNAS (1974), pp. 2-3.



## Appendix

*The Edict of Wieluń of 1424:*

Vladislaus Dei Gratia Rex Poloniae etc. Significamus tenore praesentium quibus expedit, universis praesentibus et futuris harum notitiam habituris, quod cum sum dissimulatione praeterire non debemus imo arcemur Divinae legis perpetuis institutis, pestiferos haereticorum errores, quos in Dei contemptum et in Christianae fidei detrimentum et enervationem politiaeque jacturam, iniqua perversorum corda conflaverunt, etiamsi quaecumque oporteret Nos subire pericula, a finibus nostris propulsare, et in gladio deijcere, ut qui censure ecclesiae non terrentur humana severitate muletentur, maturo consilio Praelatorum, Principum et Baronum nostrorum habito et consensu, et etiam de certa ipsorum et nostra scientia praesentibus decernimus, et pro firmo constanti atque irrefragabili edicto teneri praecipimus. Ut quicumque in Regno nostro Poloniae et Terris Nobis subjectis haereticus, aut haeresi infectus vel suspectus de eadem, fautor eorum vel director repertus fuerit, per nostros Capitaneos, Consules Civitatum, et alios Officiales ac quoslibet subditos nostros sive in officijs, sive extra viventes, velut Regiae Majestatis offensor capiat, et juxta exigentiam excessus sui puniatur, et quicumque venerint de Bohemia et intrant Regnum nostrorum, ordinariorum suorum examini aut magistrorum haereticae pravitatis ad hoc a Sede Apostolica deputatorum vel deputandorum subdentur comprehensi. Si quis autem incolarum Regni nostri cujuscunque status, dignitatis, gradus aut conditionis fuerit, hinc ad Festum Ascensionis Domini proximum redire de Bohemia neglexerit, noluerit, vel contempserit, pro convicto haeretico censeatur et poenis subjacet, quae haereticis infligi consueverunt, nec amplius ad Regnum nostrum revertatur moraturus. Et nihilominus omnia bona ipsorum mobilia et immobilia in quibuscunque rebus consistentia publicentur thesauro nostro confiscanda, prolesque eorum tam masculina, quam faeminea omni careat successione perpetuo et honore, nec unquam ad aliquas assumatur dignitates vel honores, sed cum patribus et progenitoribus suis semper maneat infamis; nec de caetero gaudeat aliquo privilegio nobilitatis vel decore. Inhibemus etiam sub eisdem poenis, omnibus mercatoribus et alijs hominibus cujuscunque conditionis fuerint, ut amodo et in posterum nullas res venales, praesertim plumbum, arma, esculenta et poculenta ad Bohemiam ducere praesumant vel portare. Quocirca vobis omnibus et singulis Capitaneis, Consulibus, et alijs Regni nostri Officialibus et subditis quibuslibet, ad quos praesentes pervenerint, mandamus quatenus praesens edictum nostrum custodire fideliter et firmiter debeatis et ubilibet in civitatibus, villis et alijs quibuslibet locis publicis et provatis, et specialiter ubi tractabuntur judicia, et ubicunque contigerit aliquam multitudinem hominum confluere, palam vocibus preconum faciatis proclamare, ut nullus valeat praetendere ignorantiam praemissorum, harum quibus sigillum nostrum appensum est testimonio literarum. Datum in Wieluń die Dominica, Judica me Deus, anno Domini 1424.

Source: *Vladislaus Jagello contra hereticos et fautores eorum in Wieluń constituit*, in J. Ohryzko (ed.), *Volumina Legum*, 1, Sankt Peterburg, 1859, p. 38.

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# LAW AND HUMANITIES IN GIAMBATTISTA VICO'S THOUGHT. A FIRST UNDERSTANDING

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## 1. Introduction

“Reading Vico for the School of Law” – as the title of a 2007 paper invites us to do<sup>1</sup> – requires a previous commitment to the method of the historical knowledge we put at stake.

If the recent interpretations of Giambattista Vico attempting to fully detach the Neapolitan philosopher from his time seem too daring, see e.g. Alasdair MacIntyre's statement<sup>2</sup>, it is constraining – and probably disrespectful of Vico's theory of knowledge – to address Vico by completely forgetting our contemporary problems as legal scholars.

Thus, other than tracing audacious fatherhoods – Vico has been interpreted *à la fois* as a proto-idealist<sup>3</sup>, a historical materialist<sup>4</sup>, a modern<sup>5</sup> and an anti-modern thinker<sup>6</sup>, or even a moral pluralist<sup>7</sup> – the actuality of Vico will be intended as the possibility of a better understanding of some contemporary legal philosophical issues through a more accurate knowledge of the Neapolitan philosopher.

Undoubtedly, the ‘Law and Humanities’ approach – spreading its influence either to the legal education and to the theory of law – exhibits its more vivid references to Vico.

Since when James Boyd White published his well-known book *Legal Imagination* in 1973<sup>8</sup>, the ‘Law and-’ approach gained another term of ref-

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1 VITTEVEEN (2008).

2 According to MacIntyre Vico's ideas need to be studied «detached from their place in the sterile systematics of Vico's new science». MACINTYRE (1988), p. 22.

3 See the very famous Benedetto Croce's monography *La filosofia di Giambattista Vico*, that contributed to spread Vico's works in Italy.

4 Because of Marx' quote of Vico: MARX (1976), p. 493. About the subject see TAGLIA-COZZO (1983).

5 For instance, BOBBIO (1976), pp. 117-132.

6 LILLA (1993).

7 BERLIN (1976).

8 BOYD WHITE (1985).

erence: literature, of course, but humanities too, invoked to react against the «positivistic and ruled focused» «dominant theory of law»<sup>9</sup> in the English-speaking world at that time. In the early Seventies, the image of law depicted by Boyd White is that of a 'language' (in his original meaning) under a double attack: on the one hand the 'Law and Economics' approach was trying to reduce the law to a costs-benefits analysis; on the other hand the left thinkers were trying to identify the law with the expression of class-interests, and seeking to reform it in the name of a vague idea of community. Boyd White reacted to both the approaches by proposing a different concept of law: not a set of rules, but rather a language, which means «habits of mind and expectations», i.e. «a culture». The law makes a world – wrote Boyd White, being a «system of thought and expression», and – as a profession – is «an art of reading the special literature of the law and an art of speaking and writing in this language. It is a branch of rhetoric»<sup>10</sup>.

When, thirty-five years later, the international symposium *Recalling Vico's Lament: The Role of Prudence and Rhetoric in Law and Legal Education* would claim the importance of Vico's legacy, pushing legal scholars to re-read Vico, similar arguments were put at stake.

The reaction against a certain 'sociolegal positivism'<sup>11</sup> is the main reason for the actual need of recalling Vico, especially in a very precise domain, i.e. the legal education.

If the legal education<sup>12</sup> pays the price of a reductionist theory of law, which identifies the law with a set of «rules, principles, and regulations that have

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9 *Ivi*, p. xii.

10 *Ivi*, p. xiii: «Of course law is not just a language, for it is part about the exercise of political power. But I think the greatest power of law lies not in particular rules or decisions, but in its language, in the coercive aspects of its rhetoric – in the way it structures sensibility and vision».

11 See, for this analysis, CONSTABLE (2005), p. 10: «Sociolegal positivism presumes that positive law is humanly articulable power in at least two senses: as the declarations of officials or in scholars' descriptions-conceptual or empirical-of the order and dynamics of human social systems. Even when positive law is not the command of a distinct human sovereign or the official unification of a system of rules, it appears as a humanly made creation of society – whether as norms or practices or network of institutions – that is describable in sociological terms».

12 The state of the art is meant to fit United States legal education, even though Witteveen, the Author of the essay *Reading Vico for the School of Law*, has a European background (he teaches Jurisprudence and Rhetoric in a Dutch University).

been officially declared law»<sup>13</sup>, the call for a different way of studying, on Vico's footsteps, means restoring a multifaceted idea of law as well as the legal reasoning.

Not «a complete, closed system that can be studied empirically for the way it functions in all human relations», but rather the process of its making, where prudence and rhetoric (but also poetic) play a pivotal crucial role.

Reading some of the most popular 'Law and Humanities' contributions, we might easily acknowledge this common ground: when Martha Nussbaum writes about «the vital need to re-introduce the poetic imagination into the rational argumentation practices of the law» and «that storytelling and the literary imagining imagination are not opposed to rational argument, but can provide essential ingredients in a rational argument»<sup>14</sup> we can hear the echo of Vico's «lament».

In his famous oration *De nostri temporis studiorum ratione* (1708), he wrote indeed:

«At the very outset, their common sense should be strengthened so that they can grow in prudence and eloquence. Let their imagination and memory be fortified so that they may be effective in those arts in which fantasy and the mnemonic faculty are predominant. At a later stage let them learn criticism, so that they can apply the fullness of their personal judgment to what they have been taught. And let them develop skill in debating on either side of any proposed argument»<sup>15</sup>.

## 2. *The critiques to Cartesian method in De nostri temporis studiorum ratione*

Giambattista Vico delivered *De nostri temporis studiorum ratione*, translated in English as *On the Study Methods of Our Time*, in 1708 at the University of Napoli, where he thought Rhetoric<sup>16</sup>. In this pedagogical oration, written before the first version of his masterpiece *Scienza Nuova*, Vico took up in a very original way the famous *Querelle des anciens et des modernes*, dating back to the end of the 17<sup>th</sup> century<sup>17</sup>. Rather than taking stance for one or the other party, he claimed that the modern method, called by Vico *ars critica*, failed at fulfil the promises of the Modern Age. As a matter of fact, Vico invites us to embrace

13 WITTEVEEN (2008), p. 1213.

14 NUSSBAUM (1995), p. xii.

15 VICO (1990), p. 19.

16 For this aspect of Vico's autobiography, see Vico (1971e).

17 See CAMPAILLA (1973).



the Cartesian method, yet without sacrificing a more complex idea of rationality – involving wisdom, eloquence, and prudence – whose Vico gives an original account, not limiting himself to an anachronistic apology of the ancients.

As the translator Elio Gianturco in his *Introduction* writes:

«Vico draws, so to speak, the final balance-sheet of the great controversy; not only that, but transposes it to a ground where the problem posited can receive a solution. He is a reconciler of the two factions; he lifts their debate to a high philosophical plane, he rises to the concept of a modern culture, harmonizing the scientific with the humanistic aspects of education»<sup>18</sup>.

The philosophical reasons connected to a humanistic pedagogy are based on an original highlighting of prudence as juris-prudence<sup>19</sup>.

But first, some preliminary remarks need to be made, dealing with the Cartesian legacy, which is certainly not completely rejected<sup>20</sup>, but yet overruled.

In his *Discours sur la méthode*, Descartes made ostensibly clear his main goal: the true knowledge, the certain knowledge, needs a certain method, which does not involve other fields of study not dedicated to it. Mastering the method, according to Descartes, will bring to the truth even though rhetoric is completely neglected<sup>21</sup>.

This assumption, far from being a mere methodological one, depends upon the metaphysic connection built in a revolutionary way by Descartes between *knowledge* and *being*. Since the certainty of the self, coming from the *cogito*, is a truth – *primum verum* in Vico's words<sup>22</sup> – it is still the abstract *cogito* that allows to assess the true knowledge.

Vico recognizes the importance of the Cartesian project<sup>23</sup>, as we read in in his response to an anonymous critic:

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18 GIANTURCO (1990), pp. xxiii-xxiv.

19 Thus: VERENE (2008).

20 Nicolini notably stood up for the fatherhood of the French philosopher in NICOLINI (1932), pp. 117-118.

21 He says: «Those with the strongest reasoning and the most skill at ordering their thoughts so as to make them clear and intelligible are always the most persuasive, even if they speak only low Breton and have never learned rhetoric». DESCARTES (1985), p. 114.

22 VICO (1971c), par. III, cap. I: *De primo vero, quod Renatus Carthesius meditatur*, p. 71. About the shifting in terms of theory of knowledge that Vico draws from Descartes, see DE GIOVANNI (1962).

23 In his earliest orations, e.g. the 1699 one (*Ut mentis*), Descartes is even championed to show the magnificence of human intellect.



«Si dee certamente obbligazione a Renato, che volle il proprio sentimento regola del vero, perché era servitù troppo vile star tutto sopra l'autorità; gli si dee obbligazione che volle l'ordine nel pensare, perché già si pensava troppo disordinatamente con quelli tanti e tanto sciolti tra loro *obiicies primo obiicies secondo*»<sup>24</sup>.

He feels the same need for a new method, but he finds Descartes' one too narrow.

The title *De nostri temporis studiorum ratione* echoes Descartes' method indeed, which is the constant target in Vico's discourse<sup>25</sup>. The oration, as we said, originates from a peculiar declination of the *Querelle*: whether the modern study method – which is summarized by Cartesian rationalism – is better than the ancient one.

Vico acknowledges all the improvements and the scientific discoveries that Cartesian method, as applied to mathematics and geometry, granted. Nevertheless, *ars critica* leaves completely unattained other realms of reality, e.g. the realm of the likelihood, where we might ascribe human artefacts.

This point leads to the core of the earliest Vichian philosophy, rightfully claiming to be a comprehensive theory of knowledge: since God made the world, he is the only one who is entitled to know it. Men can just know what they made, for the criterion of the truth is having made it<sup>26</sup>, and the human knowledge is supposed to reproduce the divine one.

This theoretical stance throws light on the pedagogical method, which, in its turn, illustrates the validity of the thesis.

The main and the only interest of *ars critica* is to pursue the *primum verum*, found by Descartes in the certainty of the *cogito*; this concern leaves beside all the *vera secunda*, the likelihood, on which the *sensus communis* is grounded: «ut autem scientia a veris oritur, error a falsis, ita a verisimilibus gignitur sensus communis».

Developing common sense should be the main purpose of education, as intended by Vico, but *ars critica* stifles it, especially if it is imposed in the early youth, where the fantasy – another Vichian topos – and the imagination are prevailing.

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<sup>24</sup> Vico (1971d), p. 167.

<sup>25</sup> For a deep analysis of Cartesian, as well as Baconian, influences in *De ratione*, see CAMPAILLA (1971).

<sup>26</sup> We find the sentence in *De Antiquissima* [= Vico (1971c)], p. 63 («Latinis verum et factum reciprocantur, seu, ut Scholarum vulgus loquitur, convertuntur»), yet anticipated in *De ratione* [= Vico (1971b)], p. 803.

This is especially true when it comes about the human nature, as well as the human actions, which are directly involved in legal matters. If *ars critica* chooses to highlight the study of physical world – however unsuccessfully, since only God can truly know it – it fails to provide proper epistemic instruments for understanding human actions and for evaluating them. And this happens because it considers the physical world certain, whilst the human one totally uncertain: «quia unus hodie studiorum finis veritas, vestigiamus naturam rerum, quia certa videtur: hominum naturam non vestigamus, quia est ab arbitrio incertissima».

The whole realm of practical reason is uncovered by Cartesian method, for it considers itself accomplished as long as it reduces all the possible causes to the one. On the contrary, the prudence concerned with human actions, according to Vico, the more accurate is, the more causes are evaluated: «adeo hoc scientia a prudentia distat, quod scientia excellent, qui unam causam, per quam plurima naturae effecta perducunt; prudentia vero praestant, qui unius facti quam plurimas causas vestigant, ut quae sit vera, coniciant»<sup>27</sup>. Human actions are not meant to be understood with a static and abstract method, but rather with the ‘Lesbian rule’, a persuasive metaphor that illustrates the flexibility of understanding and evaluating the human things<sup>28</sup>.

### 3. *The role of law in Vico’s early philosophy*

This ability to interpret and understand human actions with flexibility is ascribed by Vico to the Roman law legacy. As a Roman law scholar, Vico devoted a big part of his oration to the Roman jurisprudence, which was, according to a famous sentence, itself a philosophy. Whilst in the Ancient Greece the philosophers were meant to attend to legal matters, in Rome it was quite the opposite: «Philosophi autem Romanorum ipsi erant iurisconsulti, ut qui in una legum peritia omnem sapientiam posuerunt, sive sapientia heroicorum temporum meram conservarunt»<sup>29</sup>.

<sup>27</sup> Vico (1971b), p. 811.

<sup>28</sup> «Non ex ista recta mentis regula, quae rigida est, hominum facta aestimari possunt; se dilla Lesbiorum flexili, quae non ad se corpora dirigit, sed se ad corpora inflectit, spectari debent», *ibidem*. This metaphor is ostensibly borrowed from Aristoteles, *Etica*, V, 10, 1137b.

<sup>29</sup> Here Vico quotes Horace: «Haec fuit sapientia quondam, publica privatis secernere, sacra profanis, concubitu prohibere vago, dare iura maritis, oppida moliri, et leges incidere legno». *Ivi*, p. 823.

The model to look at was the great ability, cultivated thanks to the prudence to adapt the multifaceted facts to the law. The practical wisdom consisted exactly in this capacity, performed through the *fictiones*: «Ad quae si quis animum recte advertat, iuris fictiones nihil aliud, nisi priscae iurisprudentiae productiones et exceptiones legum fuisse comperiat: quibus prisca iurisconsulti, non, ut nostri, leges ad facta, sed ad leges facta accomodabant»<sup>30</sup>.

Vico goes on saying that if one of the virtues of his contemporary jurisprudence was the larger interpreter's freedom, this has also produced a decrease of obedience to the law. From losing this ability to adapt facts to laws, it originates the increase of new laws, more and more needs are perceived by the legislator. And this leads to a very difficult task for the interpreter but also for the citizens, incapable of knowing which rule they should follow. As a matter of fact, this changing process is intended by Vico as generating from the very same Roman history, that he describes as a history of degeneration<sup>31</sup>. It is easy to find here the prelude of his famous cyclical conception of history, as fully represented in his *Scienza Nuova*<sup>32</sup>.

But the history of ancient jurisprudence is not assumed as a mere model of lost virtues. The historical knowledge, as it will become more and more evident in Vico's late works, is the real knowledge: if men can only know what they have made, the truth can only be attained in its historical making. So, it is for the nature of law, that we can understand only through its historical development. This latter point entails the problem of natural law, one of the most discussed in Vico's philosophy. But before that, there is also another philosophical reason that justifies the *excursus* on the ancient jurisprudence, a reason made clearer by reading both Vico's autobiography and the *Scienza Nuova*. According to the Italian legal philosopher Guido Fassò, the path epitomized by the sentence *ex iurisprudentia philosophia* is not only a historiographical, but rather a theoretical one. Indeed, we read in the *Scienza nuova* that:

«dall'osservare ch'i cittadini ateniesi nel comandare le leggi si andavan ad unire ad un'idea conforme d'un ugal utilità partitamente commune a tutti, cominciò ad abbozzare i generi intellegibili, ovvero gli universali astratti, con l'induzione»<sup>33</sup>.

Fassò did not claim that the thesis represents a sort of projection of Vico's

<sup>30</sup> *Ivi*, p. 827.

<sup>31</sup> *Ivi*, pp. 825-827.

<sup>32</sup> See especially books IV and V of *Scienza Nuova*.

<sup>33</sup> Vico (1971f), p. 928.

personal itinerary as a scholar – from the law studies to philosophy – but he rather claimed that the originality of the historiographical and theoretical thesis could rise only from the direct connection that Vico experienced himself between law and philosophy<sup>34</sup>.

This thesis is argued with compelling arguments by Fassò, who notably interpreted the influence of the ‘quattro autori’ from a jurisprudential point of view<sup>35</sup>: if we want to take seriously Vico’s statement about the influence of Plato, Tacitus, Bacon and Grotius on his thought, the coherence of these quite diverse thinkers needs to be found only on the legal ground. Plato taught Vico the necessity of an ideal law; Tacitus the importance of legislation<sup>36</sup>; Bacon tried to reconcile Plato’s and Tacitus’s antithetical perspectives; Grotius saw the need of a universal system of law<sup>37</sup>. The legal roots of Vico’s philosophy are showed by Fassò also in the famous *verum-certum* formula. Indeed, in his *De ratione* Vico employs Roman law as an instrument to illustrate his thesis. The Lesbian rule fulfils exactly this task: the *certum* of the changing circumstances, and the *artes* to track the *certum*, leads to the *verum*. But it is also remarkable the peculiar phenom-

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34 By claiming so, Fassò was criticizing the authoritative Gentile’s reading, according to whom the law was just one of many objects in Vico’s original philosophy. GENTILE (1927), *Studi*, p. 99. *Contra* the isolated works, at that time, by Donati, now collected in DONATI (1936); Alessandro Giuliani, anticipated by Fulvio Tessitore, interestingly underlines the persistence of Vico’s thought as a jurist within the Italian legal scholarship during the XIX century, well before the philosophical Vico’s renaissance: GIULIANI (1992-1993), p. 345.

35 Fassò was openly praised by Croce for his earliest work in *Quaderni della Critica* [CROCE (1949)], p. 89: «Ma il nuovo indagatore, Guido Fassò, mi viene a conforto col suo ottimo lavoro che dà una diligentissima ed acuta interpretazione ed esposizione del corso non già logico ma storico o, per meglio dire, psicologico della formazione della *Scienza nuova*; esposizione che è utile possedere e che si segue con curiosità». Benedetto Croce, after his famous 1911 work on Vico, where he also wrote about the relationship between the natural law theory and Vico, reviewed the monographical issue of *La Rivista internazionale di filosofia del diritto*, dedicated to the bicentennial of the *Scienza Nuova*.

36 According to Fassò, we cannot, of course, infer directly from Tacitus this point. Tacitus’ relevance, and its implication with law, derives from the assumption that he saw the man as it is, as much as legislation, in Vico’s words, needs to see the man as he is; Fassò (1949), pp. 23-24.

37 Fassò (1949), pp. 22-24. It is probably Vico’s interpretation of Grotius that led Fassò to renovate Grotius studies, emphasizing the more complex historicity of the jurist. See on this point FARALLI (2014), p. 642.

enon of the coexistence of *ius civile* and *ius honorarium*, representing, the first one the *certum* of the authority, the second one the *verum* of the Reason, progressively incorporating the first<sup>38</sup>.

Thus, we should say that, beyond Fassò's words, law generates philosophy in different ways (in a meaningful Vico's style). In a first understanding, according to the *Scienza nuova*'s quote above, it literally gives birth to the abstract thinking, that emulates the logical activity of generalization from the individual utility to the common one. The connection is shown also from a biographical point of view, since the study of law predated the philosophical activity. But the intimate connection of *iurisprudentia* and *philosophia* rests mainly on theoretical reasons, dealing on the one hand with the *verum-certum* formula, on the other hand with the prudential dimension of law<sup>39</sup>.

This latter point leads us to the reasons lying behind "Recalling Vico's Lament". The quest for renovation of legal pedagogy, as intended by contemporary legal scholars, rests on a dissatisfaction for a legalistic pedagogy of course, but above all for a strict positivistic conception of law.

Dealing with the problem of natural law in Vico's philosophy would go well beyond the aim of this paper, but there is no doubt that the legal pedagogy is tightly related to the conception of law.

Thus, if Vico's call for renovation was essentially targeting the case law method in teaching law<sup>40</sup>, from a theoretical perspective Vico was making a stand against the abstract rationalism of the natural law systems, such as Pufendorf's, Selden's, and Grotius' ones (although the latter was one of Vico's four "authors"<sup>41</sup>).

At this juncture, one may raise a question about the very different targets the 'Law and Humanities' approach and the *De ratione* are trying to set. On the one

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38 FASSÒ (1949), p. 44.

39 See *amplius* VERENE (2008).

40 The widespread legal study method when Vico was a student was the *Mos Italicus*, that led him stop attending Verde's classes «tutte ripiene di casi della pratica più minuta dell'uno e dell'altro foro de' quali il giovinetto non vedeva i principi, siccome quello che della metafisica aveva già cominciato a formare la mente universale e ragionare di particolari per assiomi o sien massime» [Vico (1971e), p. 8] and starting the study of Vulteio and Canisio on his own, as we learn from his Autobiography. As a matter of fact, when he wrote *De ratione* things were deeply changed, thanks to the renovation led by Francesco D'Andrea, who promoted the historical study of law; DE GIOVANNI (1958); MAZZACANE (1986).

41 About the relationship between Vico and Grotius see the classic works by Fassò and Nicolini (see bibliography).

hand, the ‘Law and Humanities’ approach, as we have seen, is a reaction against the ‘sociolegal positivism’. On the other hand, Vico addresses a strong critique against what he will later call the ‘natural law of philosophers’, i.e. the rationalistic natural law systems. Thus, legal positivism as well as natural law theories are both charged of providing a dissatisfying theoretical foundation for legal pedagogy. This double and antithetical opposition let us rethink about one of the most discussed topic in legal philosophy – positivism *vs.* natural law theory – from a peculiar perspective, in which it is acknowledged the interpreter’s role.

Although Vico has been interpreted also as a precursor of hermeneutics<sup>42</sup>, there is no need to make such a challenging statement in order to recognize the very innovative role attributed by Vico to the legal interpreter.

Indeed, the main part of the legal decision-making process is the discovery of the *factum*, the interpretation of human actions along the (Aristotelian) Lesbian rule method. If the exemplum of Roman law experience can be set as a model, it is due to the particular ability of Roman jurists to adapt the variety of the everchanging human actions to the letter of law, thus finding the ‘civil equity’ in every case.

The introduction of this latter term – ‘civil equity’ – entails a more complex idea of law in Vico, because its meaning lies not only on the *aequum bonumque* judicial formula, but it also reaches a more political dimension (‘civil’ from *civitas*):

«Igitur, quando leges pro reipublicae institutis condere et interpretari necesse est, principio regni constitutionem, seu legem illam regiam, quae lata quidem non est, sed cum Romano principatu nata, spectari et doctrinam de republica monarchica optime iurisprudentem tenere oportet. Deinde omnia pro regni natura ad civilem ordinem aequitatem, quae Italis ‘giusta ragion di Stato’ appellatur, et unis rerumpublicarum prudentibus gnara: quae et ipsa aequitas naturalis, et quidem amplior est, utpote quam non privata utilitas, sed commune bonum suadeat»<sup>43</sup>.

The reference to civil equity also helps to emancipate the Neapolitan thinker from a relativistic and historicistic hint<sup>44</sup>. Law is not just the *factum*,

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42 Notably by Emilio Betti, who had quoted and discussed Vico since his very first writings. More precisely on Vico see BETTI (1991). About the influence of Vico on Betti’s thought: PINTON (1973).

43 VICO (1971b), p. 837.

44 The question about possibility of ascribing the Vichian philosophy of history to the historicism is enormously debated. More recently see NUZZO (2001).

is not a happening that we can describe without evaluate, but rather the everlasting changing attempt to find the *verum* of the justice in the *factum*<sup>45</sup>. Thus, if it is undeniable that the knowledge of law cannot but be a historical knowledge, it is also true that in the very same *De ratione* Vico critiques the historical study of law promoted by the *Mos Gallicum*, because it reduces law to the history of Roman law<sup>46</sup>. That's why a humanistic legal education is so important in the edification of *sensus communis*, which entails of course the ability to understand history, but most of all to evaluate it and to judge human actions. Jurisprudence is essentially prudence, *prudentia*, having a practical dimension that today the Law and Humanities supporters are seeking to restore against the reductionist view of law (law as positive law and as social phenomena). That is why, apart from the diversity of the critique targets – sociolegal positivism and natural law theory –, we feel the need to recall Vico's lament: only through the humanistic pedagogy the young scholars, jurists to be, can flourish in this particular ability to understand human actions by constantly evaluating them in the light of law, which is *iuris-prudentia*.

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45 Very insightful the classical interpretation of the Italian jurist Giuseppe Capograssi on this aspect: «L'affermazione giuridica non è dunque altro che un'affermazione di indipendenza (di libertà) dall'empirico, dal condizionato; tutta l'esperienza, arrivando a quest'affermazione, culmina così in una metafisica per cui i placiti dei giureconsulti sulla indivisibilità, sulla incorruttibilità, sulla estraporalità del diritto, arrivano a mettere capo, senza che i giuristi escano fuori dal sistema e dalla tecnica giuridica, al platonismo, che trova una conferma singolare ed una singolare riprova nella gigantesca esperienza del diritto romano. E sono proprio i giuristi a far dell'animo il soggetto dell'universo diritto, di ogni diritto, e secondo i placiti stessi dei giuristi il diritto è modo della sostanza immortale; modo, si intende, come idea che modifica e forma essenzialmente l'anima concretamente intesa come attività e la sua azione»; CAPOGRASSI (1925), p. 151.

46 «At ii potius leges Romanis suas reddiderunt, quam ad nos nostris rebuspublicis aptas apportaverunt. Quare in hac ipsa sua de iure privato prudentia, ut de privatis nostri temporis controversiis respondeant vel decident, Accursianos evolvunt, et ab iis aequi argumenta mutantur». Vico (1971b), p. 837.



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THE NATIONAL CODIFICATION OF CIVIL LAW IN POLAND  
AT THE BEGINNING OF THE 19<sup>th</sup> CENTURY. SOURCES AND INSPIRATIONS \*

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The legal system of the 18<sup>th</sup> century Polish territories was very complex. It is indeed impossible to speak of a single system. There was a number of them. Different systems were applied to the nobility, *bourgeoisie*, peasants, Jews, etc. The one used by the nobility was called *ius terrestre* in Latin or *prawo ziemskie* in Polish. The jurisdiction of the highest gentry courts, like the *Sejm* Court or main tribunals for the Crown and Lithuania, also covered cases of uppermost importance for the entire state, such as *crimen laesae maiestatis* or crimes committed by high-ranking officials and cases of first impression. *Ius terrestre* was not a single system, either there were significant territorial differences: the Eastern voivodeships were governed by the Third Lithuanian Statute of 1588, Pomerania was governed by the Prussian statute of 1598, while the central territories had no codification and the primary role was played by customary law (with some further differences between the customs of individual voivodeships). Moreover, all the three major territories had numerous *Sejm* constitutions, which regulated various institutions, such as land registry or dowry issues.

At the end of the 18<sup>th</sup> century central Polish lands, where no codification was in place, were annexed by Prussia and Austria, which quickly replaced the Old Polish laws with their own civil, penal and procedural legislation. After Napoleon established the Duchy of Warsaw in this area, French codes were adopted there to regulate civil substantive law, civil procedure and commercial law. It should be emphasized that there was no official translation of these codes into Polish and the courts were theoretically expected to use the French text. At the same time, the Prussian and Austrian substantive and procedural penal laws were still in force.

The fall of Napoleon put an end to the Duchy of Warsaw, which fell under

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Russian occupation. However, the liberal *tsar* Alexander I planned to maintain the shell of Polish statehood in a union with the Russian Empire and under common rule. The *tsar* paid great heed to Polish political elites in hopes of organizing the relationships in the Kingdom in line with their expectations. In 1814 the *tsar*'s edict laid the general groundwork for the planned reforms. The works on codification continued for over dozen years.

It was around that time when the idea of creating a national codification of private law emerged and began to gain popularity. Unfortunately, there were no thinkers willing to elaborate its philosophical foundations in a systematic manner, but the concept nevertheless had many supporters. The evolution of the national codification idea may be reconstructed today based on numerous statements derived from the records of committees involved in the legislation process, parliamentary discussions and the press. It may be said that the overarching desire was to create a system of law that would support building and strengthening the national identity. This could be done by way of retaining or restoring entire normative elements of national legal tradition, like specific institutions, procedures, legal terms and symbols. But non-normative factors were also significant, such as the specificity of court judgements (given that under statutory law systems verdicts are not recognized as a source of law), the manner in which the law functions among the society and the character of the science of law. It is worth mentioning that the idea of creating national codification may also mean creative reception of foreign law useful in local conditions. In this situation, not only the selection of foreign sources of law, but also the manner of application and interpretation of these sources are significant. There were many sources of foreign law which could be taken into consideration in the process of preparing the national codification, as the Polish lands at the turn of 18<sup>th</sup> and 19<sup>th</sup> century were a kind of an experimental field for many legal systems (Austro-Galician, Austrian, Prussian and French).

Now a fundamental question should be raised: where could Poles find specifically Polish legal tradition in early 19<sup>th</sup> century? Firstly, the town and the church law had to be excluded. The town law (*Ius municipale*) had German origins and it was called simply German law (*Prawo niemieckie*). There was a variety of those town rules, but the most important one was Magdeburg law (*Ius municipale magdeburgense*). Of course, foreign origins and the fact that pre-partitional Poland had been a gentry republic caused that at the beginning of the 19<sup>th</sup> century it was impossible to treat town law as a basis of the national codification. Similarly, the canon law as the universal legal system

of the Catholic Church could not be a foundation and even some specific features of its application in Poland (like simplicity of obtaining marriage annulment)<sup>1</sup> did not change it.

Specifically native features of the Polish law could be found especially in *ius terrestre*. But in the 18<sup>th</sup> century it was completely anachronistic owing to its uncoded, disorderly form, because the fact that, besides written laws, many customs were in force, and that the same *ius terrestre* was strictly connected with feudal reality and supremacy of one estate (nobility) over the other (jurisdictional control of the nobility over the peasantry); moreover, was still strong the existence of Medieval institutions, such as the rule of accusatorial procedure in criminal cases, compounding fines (financial penalty instead of corporal punishment including death penalty), and no separation between criminal and civil procedure.

Furthermore, we must note the strong position of the parliament and limited royal authority. It all shows that the evolution of legal institutions in Poland in early modern period was different from German states and France, where the power of monarchs was strengthened and parliaments were weakened. In Western Europe civil and criminal proceedings were separated and criminal trials were initiated *ex officio*. Moreover, the manorial system was mitigated by monarchs. Although some similarities between the evolution of law in Poland and England can be found.

As mentioned before, in the lands of Prussian and Austrian annexation, old Polish laws were derogated quickly. But there was one important difference. In Prussia courts proceeded in German but in Habsburg Galicia, Latin was sustained in the judiciary, owing to which judges active in Old Poland still could carry out their duties. In contrary, Prussian judges had to be fluent in German, which meant the end of careers of the judges who had worked in the Commonwealth. Admittedly some Poles received positions in courts but the majority of them was young and without experience in applying *ius terrestre*. They were foreigners in their own country<sup>2</sup>.

Consequently, in the Polish lands West of the Bug River (Russian partition was an exception), Old Poland legal tradition was broken, and its reconstruction in the Congress Kingdom was difficult. Firstly, we must remember that in the legal system of the Commonwealth the customary law was very

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1 WENZ, WRÓBLEWSKI (2007), p. 24 nt. 22.

2 The Princes Czartoryski Library, National Museum in Cracow, manuscript, ref. no. 5259, pp. 72-73.

important. But it is extremely hard to reconstruct customs which had gone out of use. Moreover, the estate and feudal character of the *ius terrestre* was incompatible with the early-capitalistic reality of the Congress Kingdom.

As already mentioned, works on the national codification took place between 1815 and 1830. There were several changes. First, in 1818 the Prussian and Austrian penal substantive law was replaced with a new code (*Kodeks karzący*)<sup>3</sup> based on the Austrian code from 1803 (*Franciscana*)<sup>4</sup>. At the same time provisions of the *Code Civile* concerning mortgage (*hypotheca*) were replaced with parliament acts modelled on *Landrecht*<sup>5</sup> and other Prussian acts of law<sup>6</sup> (which entailed the same principles as the Old Polish law: openness, perpetuity, detailed quality). It was necessary because the rules of the Napoleonic Code regarding mortgages were even more impractical than the Old Polish statutes (in *Code Civile* mortgage was secret, temporary and could be general).

Moreover, it should be noted that in the *Code de procédure civile*, sale by auction was the basic form of enforcement proceedings that concerned real estate<sup>7</sup>. It was contrary to the Polish legal tradition. Under *ius terrestre* the main method used to satisfy a judgment was *intromisja* (*intromissio*)<sup>8</sup>. *Intromisja* means assuming possession of property belonging to another person on legal ground. Thus, a plaintiff creditor who won the judicial trial could take possession of real estate belonging to the debtor and get *fructus naturales* and *fructus industriales* until he collected income equivalent to the entire debt. At this point, he would return the possession of real estate to the former debtor. That solution was of course favorable to gentry, who borrowed money and secured it with real estate. So in 1823 sale by auction was changed to *intromisja* as the main method used in enforcement proceedings<sup>9</sup>.

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3 *Dziennik Praw Królestwa Polskiego*, V, no. 20, pp. 3-232.

4 *Gesetzbuch über Verbrechen und schwere Polizey-Uebertretungen*, Wien, 1803; Śliwowski (1958), p. 388.

5 *Allgemeines Landrecht für die Königlich Preussischen Staaten*, Berlin 1794.

6 *Allgemeine Hypotheken-Ordnung für die gesammten Königlichen Staaten vom 20 Dezember 1783, nebst den dieselbe ergänzenden Gesetzen und Verordnungen herausgegeben mit erläuternden Anmerkungen, unter Berücksichtigung der ergangenen Ministerial-Instruktionen, Reskripte und der Präjudikate*, Berlin 1861.

7 KRÓLASIK (2014), p. 137; moreover, DĄBKOWSKI (1911), v. 2, pp. 293-294, but also MATUSZEWSKI (1978), pp. 19-26.

8 OSTROWSKI (1784), v. 2, pp. 151-168.

9 BARDACH, SENKOWSKA-GLUCK (1981), pp. 521-522

Finally, in 1825, the first book of the national code was adopted (henceforward: the Polish Code of 1825 or KCKP)<sup>10</sup>. This act was fashioned after the first book of the Napoleonic Code, but those elements which had been most criticized were removed, especially the lay model of marriage. Personal matrimonial law was regulated following a mixed model, whose construction was based on the solutions of the Austrian Civil Code of 1811 (which, in turn, had used the solutions of the 1783 *Ehepatent* in this extent). Marriage was concluded before a priest of a religious denomination approved by government. State courts judged over matrimonial matters (invalidation, divorce and separation), but they were expected to respect the religious laws in this scope.

The influence of the Napoleonic Code on the Polish Code of 1825 is undeniable, however no one has ever tried to estimate the scale of that impact. Therefore, it is my attempt to do it. I have prepared a specific method to achieve accurate results<sup>11</sup>. The Code had 521 articles. I have tried to find the source of inspiration of each one of them. Of course this method is imperfect. Size and importance of particular articles were not taken into consideration. That problem will be taken up as the next stage of research.

First of all, basing on conclusions reached by researchers from previous generations, I have taken the Napoleonic Code into consideration<sup>12</sup>. I have also compared the regulations of the Polish Code of 1825 with the Austrian Civil Code of 1811<sup>13</sup>, the Prussian *Landrecht* and pre-partition Polish laws. It must be noted that in 1797 the Civil code of Western Galicia was introduced into the southern Polish territories. It was a kind of draft of the code which was prepared by Karl Anton von Martini for all countries of Cisleithania<sup>14</sup> and in 1811, after introducing some amendments by Franz von Zeiller, it became the civil law of the entire Habsburg Empire with the exception of Hungary<sup>15</sup>. The Prussian *Landrecht* of 1794, in turn, was in force in the western Polish territories. Thus Polish lawyers knew all those codes well.

Results of my analysis confirmed that the influence of the Napoleonic Code was very strong. 348 of 521 articles were taken from Code Civil or were

10 *Dziennik Praw Królestwa Polskiego*, X, n. 41, pp. 3-290.

11 Sources of inspiration of my analysis were: JARRICK, WALLENBERG BONDESSON (2011); JURGAITIS (2007).

12 GRYNWASER (1951), p. 133.

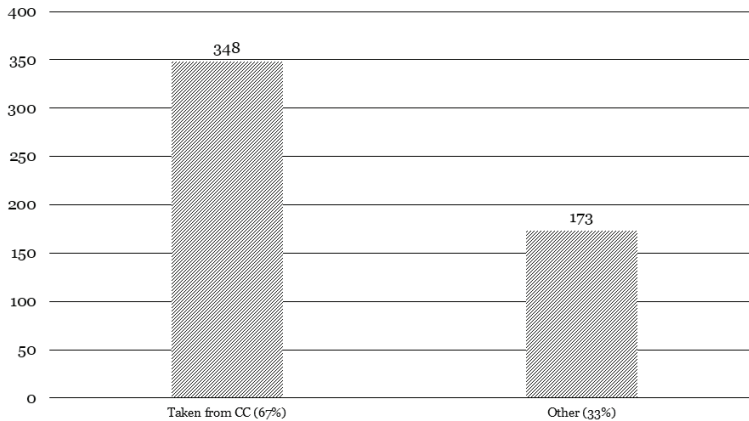
13 *Allgemeines bürgerliches Gesetzbuch für die gesamten deutschen Erblander der oesterreichischen Monarchie*, Wien 1811.

14 SÓJKA-ZIELIŃSKA (2009), pp. 91-93.

15 SÓJKA-ZIELIŃSKA (2009), pp. 95-96.



inspired by French regulation. On the other hand, the impact of Prussian and Austrian law was rather weak. I have found only 12 articles inspired by Austrian law in the Polish Code. Prussian law was even less influential.



The sources of the Polish Code of 1825

Of course, there were many ways of using French regulations by Polish lawmakers. Some articles were simply copied from the Napoleonic Code, but in many of them French solutions were used in a non-literal manner. This group of articles caused a lot of confusion in the research. But firstly I have to describe the problems involved with articles which I defined as simply copied. These too are not as easy to examine as it might seem at first glance. The Napoleonic Code was written in French and there was no official translation into Polish<sup>16</sup>. Thus, as articles simply copied, I have recognised those which were directly translated from French into Polish. Therefore, I have compared the original text of the first book of the *Code Civil* with the content of the Polish Code article by article. There was also a number of articles that obviously had to be modified. It had to do with the purposes of both acts: the first one was prepared for France and the second for Poland. The first article of the Napoleonic Code mentions the French territory (*territoire français*), while in the Polish Code there is the Kingdom of Poland (*Królestwo Polskie*) instead. In this category I also included those articles of the Polish Code which were taken from the *Code Civil* with changes regarding the jurisdiction of some officials. For example, according to the Napoleonic Code, the justice of peace

<sup>16</sup> POMIANOWSKI (2018), p. 145.



(*juge de paix*) always presided at the family council (*conseil de famille*) but pursuant to the Polish Code that could be also mayor of the town (*Prezydent, Burmistrz* or *Wójt*) (art. 374 KCKP). That change was motivated by the high cost of judicial superintendence<sup>17</sup>. I have approached similarly the changes of measurement units. It should be noted that in the Napoleonic Code *myriamètres* were used, but in the Polish Code miles (*mile*) were mentioned. The *myriamètre* was equal to about 1.25 of mile<sup>18</sup>. Thus, two miles used in the article 381 of the Polish Code instead of two *myriamètres* in the article 411 of the *Code Civil* is not a relevant change<sup>19</sup>. Last but not least, this category includes also articles of the Polish Code which were built out of two articles taken from the Napoleonic Code (for example art. 185 KCKP in place of art. 218 and 219 CC).

The second broad category comprises the articles taken from the *Code Civil* with some changes. These are the articles which were modeled by the Polish lawmaker, but their essence had not changed. For example some articles of the Polish Code are more detailed than their French counterparts<sup>20</sup>. The changes of some legal periods are treated similarly<sup>21</sup>. The category includes also those articles to which sanctions for breaking the norm were added<sup>22</sup>.

The third category (based on CC) includes the articles which were inspired

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17 GODLEWSKI (1875), p. 441; MACHUT-KOWALCZYK (2014), p. 56.

18 *Kodex Napoleona z przypisami*, Warszawa 1808, p. 4 (footnote).

19 GODLEWSKI (1875), p. 484.

20 For example art. 147 KCKP: «Mąż iedną tylko żonę, a żona iednego tylko męża w iednymże czasie mieć może. Nie można wchodzić w następne związki małżeńskie, dopóki małżeństwo poprzedzające rozwiązane nie iest. and 147 CC: On ne peut contracter un second mariage avant la dissolution du premier».

21 Art. 310 KCKP: «Przysposabiać wolno tego tylko, któremu przysposobić chcący naymnię przez trzy lata w ciągu iego małoletności, na potrzeby utrzymania dostarczał, i o którym przez tenże czas ciągle miał staranie, albo tego, który przysposabiającemu uratował życie z niebezpieczeństwem własnego. Dosyć będzie w tym drugim przypadku, aby przysposabiający był pełnoletnim, starszym od przysposobionego, bez dzieci i zstępnych prawych; a jeżeli iest małżonkiem, aby współmałżonek iego na przysposobienie zezwolił» and 345 CC: «La faculté d'adopter ne pourra être exercée qu'envers l'individu à qui l'on aura, dans sa minorité et pendant six ans au moins, fourni des secours et donné des soins non interrompus ou envers celui qui aurait sauvé la vie à l'adoptant, soit dans un combat, soit en le retirant des flammes ou des flots. Il suffira, dans ce deuxième cas, que l'adoptant soit majeur, plus âgé que l'adopté, sans enfants ni descendants légitimes; et s'il est marié, que son conjoint consente à l'adoption».

22 Art. 352 KCKP and 393 CC.

by the *Code Civil*, but their norms are relevantly different from the French law<sup>23</sup>. Of course the boundary between the second and the third category is sometimes unclear but I believe that the scale of research (more than 500 articles) ensures that possible doubts or even errors will not deform the final results.

The articles based on the Austrian Code of 1811 (ABGB) are the fourth category. This set is small (only 2%), but the majority of these regulations is very important (especially mixed construction of marriage). On the other hand, it must be noted that these norms were not completely innovative conceptions of the Austrian lawmaker, who was often inspired by the canon law or previously existing customs.

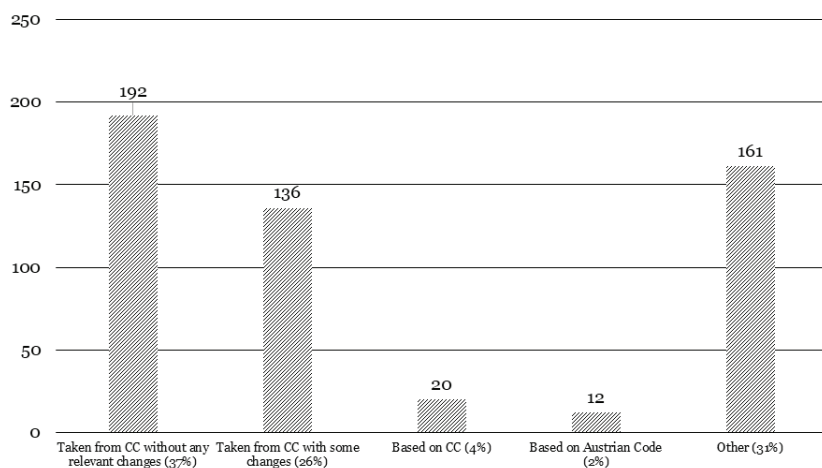
The last category includes the articles which do not fall into any of the aforementioned categories. Only part of them were created by the Polish lawmaker in 1825. In this class there are also regulations taken from earlier Polish acts<sup>24</sup> and some articles which origins need further examination.

In conclusion, I can state that the influence of the Napoleonic Code on the Polish Code of 1825 was very strong, albeit other sources of inspiration were also important. Moreover, many regulations were created by the Polish lawmakers themselves.

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23 For example art. 72 KCKP: «Každy akt Stanu Cywilnego pisany będzie na dwie ręce, to iest: w Xiędze która pozostanie na mieyscu, i w Xiędze która corocznie składaną będzie do Archivum hypotecznego. Pierwsza służyć będzie na tak długi czas, póki mieysce do zapisywania aktów wystarczy; druga tylko na rok ieden. Dla każdego rodzaju aktów, to iest: urodzenia, małżeństwa i śmierci, będzie oddzielna Xięga mieyscowa. Co się dotyczy aktów, które na drugą rękę pisane i corocznie do Archivum hypotecznego składane byđz maia, te powinny byđz pisane w iednéy Xiędze z trzech części złożonéy. Gdyby zaś która z tych części nie wystarczała na wpisywanie biegnących aktów, założonym będzie tom następny, służący tylko do końca roku» and 40 CC: «Les actes de l'état civil seront inscrits, dans chaque commune, sur un ou plusieurs registres tenus doubles».

24 For example art. 219 KCKP and art. 79 of *Prawo o ustaleniu własności dóbr nieruchomości, o przywilejach i hypotekach w mieysce tytułu XVIII. księgi III. kodexu cywilnego* (*Dziennik Praw Królestwa Polskiego*, V, pp. 295-387).



The Polish Code of 1825: clasification of articles

The legislative output of the years 1818-1825 merits a high evaluation. The laws adopted at that time draw to a limited extent from pre-partition heritage. The French, Prussian and Austrian models were the main points of reference, and the codifiers attempted to extract the most advanced regulations from them. Yet the process of drafting national codification ended with the constitutional period in Congress Poland. There began a period of assimilation of the Kingdom to resemble other territories under the rule of the House of Romanov. In new conditions, the Polish legal elites felt an increasingly stronger attachment to the French law modified in the years 1818-1825, as the law that set the central Polish territories apart from Russia. In late 19th and early 20th century, when the official language of the Kingdom was Russian, and the administration and education system had been partially unified, the civil law remained one of the principal elements that distinguished the central Polish territories from Russia.

It should be stated that the creation of national codification understood as a specific Polish legal system was impossible. Between 1815 and 1825 some important legal acts were adopted; however, they were inspired by foreign codes – not by the Polish legal tradition. It is not changed by the fact that the new statutes employed some traditional Polish legal terms (like *burgarabia*, *podśędek*, *sąd ziemiański*, etc.).

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*The Princes Czartoryski Library*, National Museum in Cracow, manuscript, ref. no. 5259.



## Chapter V

### Legal Culture in Poetry, Drama and Novel





*THE FROGS* BY ARISTOPHANES:  
WHEN COMEDY MEETS LEGAL HISTORY

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1. *Introduction*

The city of Athens, which became a significant cultural, political, and military power during the classical period, was the region where a great festival called *Dionysia*<sup>1</sup>, honouring the god Dionysus, took place. During this festival, drama was displayed in its three principal forms, which were the tragedy, the comedy as well as the satyr play<sup>2</sup>. The ancient Greek drama that flourished in Athens is considered to be a unique source not only of historic and literary information but also of legal information. Athenian drama in classical times was for the playwrights a field on which they were able to promote their points of view on important issues regarding the city of Athens, such as the politics or the institutions and it was also a field on which opinions on the legal system of Athens, laws of that time as well as the judiciary procedure were expressed<sup>3</sup>. This is the reason why legal terms and legal references can be easily underlined within all branches of Attic drama<sup>4</sup>. Aristophanes, who is the representative of the Old Comedy<sup>5</sup>, was a playwright whose eleven<sup>6</sup> surviving plays include ample comic elements, satiric aspects, political criticism, social comments, as well as legal references<sup>7</sup> and citations. One such characteristic example is the play *Frogs* which was staged at the Lenaea<sup>8</sup>, a smaller festival

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1 BOWDEN (2005), p. 42.

2 SOMMERSTEIN (2002), p. 1.

3 BUIS (2011), p. 13.

4 HARRIS (2010), pp. 2-7.

5 KUIPER (2012), p. 194. Athenian comedy is traditionally divided into three periods: Old Comedy, Middle Comedy, and New Comedy. Old Comedy survives today in the form of the eleven surviving plays of Aristophanes, while Middle Comedy is largely lost. New Comedy is primarily known from the papyrus fragments of Menander.

6 *The Acharnians, The Knights, The Clouds, The Wasps, Peace, The Birds, Lysistrata, Thesmophoriazusai, The Frogs, Ecclesiazusae, Wealth.*

7 GARNER (1987), p. 100.

8 ROBSON (2009), p. 14.

in Athens that preceded the Great Dionysia festival and it is considered to be one of the playwright's greatest comedies.

## 2. *The background of the play*

The play *Frogs* was written by Aristophanes when Athens<sup>9</sup> was under critical conditions during the era of the Peloponnesian War. The city faced both a financial and a military shortage. For this reason, the Athenian authorities decided to melt the golden statues of Athena Nike on the Acropolis in order to make new coins as a way to confront the financial shortage. Regarding the military shortage, taking into account the fact that there were not so many rowers in the Athenian fleet, the authorities of the city offered freedom and citizenship to all the slaves who were willing to row together with the Athenian citizens at the battle of Arginousai<sup>10</sup>. Despite the victory at this battle which included many losses for the side of Athens<sup>11</sup>, the city was driven into a further political crisis.

At the same time, the war against Sparta was an ambiguous issue, since there were Athenians who were in favor of ending the war, while others claimed the opposite. In the poetic field, there were two significant losses: the death of the tragedian Euripides (although Aristophanes seemed ambivalent about Euripides' experiments)<sup>12</sup> and the subsequent death of Sophocles. It is apparent that Athens was into a very difficult phase. But the well being of the city was based on the military, financial as well as cultural growth. Aristophanes must have been worried about the above conditions which deeply changed the city of Athens. So, his play *Frogs* was a very productive way through which these worries and fears could be expressed.

## 3. *The plot of the play*

This comedy<sup>13</sup> begins with God, Dionysus and his servant Xanthias who both visit Heracle's house in order to find out useful information on how to get to the underworld to bring the poet, Euripides, back to Athens<sup>14</sup>. Their

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9 AFFLECK-LETFORD (2014), pp. v-vii.

10 HENDERSON (2008), p. 14.

11 CUDJOE (2010), p. 19.

12 SILK (2000), p. 52.

13 HENDERSON (2002), p. 4.

14 DOVER (1981), pp. 242-247.

major concern is the state of tragedians in Athens. When the travelers get the necessary information, they depart for their trip. During this trip to Hades, they confront many challenges and difficulties and finally they reach their goal, which is the arrival at Pluto's house. After some misunderstandings with the doorman Aeacus, they are informed that within the house of Pluto, Aeschylus and Euripides fight over who the most accomplished tragic poet is. Aeschylus already possesses the chair but Euripides challenges him for it. Pluto calls a contest and Dionysus is made the judge. Both poets criticize each other and then the competition begins. Through a series of contests, Dionysus decides Aeschylus is the winner, and he, the poet, and Pluto return to Pluto's house for a banquet. Aeschylus tells Pluto to give his chair to Socrates, once he departs for the upper world. The chorus praises Aeschylus and expresses the hope that he will assist Athens with wise advice.

#### *4. The link between drama and law in the play*

##### *Slave torture as a proof in the Athenian court*

The play *Frogs* provides an insight into the challenge of a slave to torture<sup>15</sup>

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15 GAGARIN (1996), pp. 1-18; MIRHADY (1996), pp. 119-131; THÜR (1996), pp. 132-134; again MIRHADY (2000), pp. 53-74. Demosthenes 37.40: «He read me a long challenge, demanding that a slave who, he claimed, was acquainted with the facts, should be put to the torture; and that, if the facts as alleged by him were true, I should have to pay him the damages charged without adjustment by the jury; but if they were false, Mnesicles, the torturer, should determine the value of the slave. When he had received sureties to this agreement from me and I had sealed the challenge (not that I thought it fair)». Demosthenes 45.61: «Deposition and Challenge: The deponents testify that they were present when Apollodorus challenged Stephanus to give up his attendant slave to be put to the torture concerning the theft of the document, and Apollodorus was ready to write out the conditions on which the torture was to be administered; and that when Apollodorus tendered this challenge, Stephanus refused to give up the slave, but replied to Apollodorus that he might bring suit, if he chose, if he maintained that he was being in any way wronged by him». Demosthenes 47.8: «And free the witnesses from the risk of a trial by making Theophemus, since he then refused to do so, deliver up the woman in person, to be put to the torture regarding the assault for which I am suing Theophemus, and so make the proof result from the very statements made at that time by Theophemus with a view to deceiving the jurors. For he said in the course of the trial for assault that the witnesses who had been present and who testified to what had taken place by a deposition in writing, as the law provides, were false witnesses and had been suborned by me; but that the woman who had been present would tell the truth, deposing, not to a written document, but under

torture, giving thus the strongest kind of evidence as to which party delivered the first blow». Demosthenes 59.124: «Challenge: Apollodorus tendered this challenge to Stephanus in connection with the indictment which he preferred against Neaera, charging that she, being an alien, is living as wife with him, a citizen. Apollodorus is ready to receive for examination by the torture the women-servants of Neaera, Thratta and Coccalinê, whom she brought with her from Megara, and those whom she subsequently purchased while living with Stephanus – Xennis, namely, and Drosis – women who have accurate knowledge regarding the children of Neaera, that they are not by Stephanus. These are Proxenus, who died, Ariston, who is now living, Antidorides the runner, and Phano. And if they agreed that these children are Neaera's, I demanded that Neaera be sold as a slave in accordance with the law, and that her children be declared aliens; but if they agreed that the children are not hers but were born of some other woman who was an Athenian, then I offered to withdraw from the action against Neaera, and if the women had been injured in any way as a result of the torture, to pay for the injuries sustained». Isaeus 8.12: «You Athenians hold the opinion that both in public and in private matters examination under torture is the most searching test; and so, when you have slaves and free men before you and it is necessary that some contested point should be cleared up, you do not employ the evidence of free men but seek to establish the truth about the facts by putting the slaves to torture. This is a perfectly reasonable course; for you are well aware that before now witnesses have appeared not to be giving true evidence, whereas no one who has been examined under torture has ever been convicted of giving false evidence as the result of being tortured». Isoc. 17.15: «After he had acted in this way, men of the jury, Pasion, believing that his past conduct had clearly been in error and thinking he could rectify the situation by his subsequent acts, came to us and asserted that he was ready to surrender the slave for torture. We chose questioners and met in the temple of Hephaestus And I demanded that they flog and rack the slave, who had been surrendered, until they were of opinion that he was telling the truth. But Pasion here asserted that they had not been chosen as torturers, and bade them make oral interrogation of the slave if they wished any information». Antiph. 1.8: «What reply does he mean to make to me? He was fully aware that once the slaves were examined under torture his mother was doomed; and he thought that her life depended upon the avoiding of such an examination, as he and his companions imagined that the truth would in that event be lost to sight. How, then, is he going to remain true to his oath as defendant, if he claims to be in full possession of the facts after refusing to make certain of them by accepting my offer of a perfectly impartial investigation of the matter by torture?». Lyc. 1.29: «You hear the challenge, gentlemen. By the very act of refusing to accept this Leocrates condemned himself as a traitor to his country. For whoever refuses to allow the testing of those who share his secrets has confessed that the charges of the indictment are true. Every one of you knows that in matters of dispute it is considered by far the justest and most democratic course, when there are male or female slaves, who possess the necessary information, to examine these by torture and so have facts to go upon instead of hearsay, particularly when the case concerns the public and is of vital interest to the state».

as a proof by the litigant<sup>16</sup> in the Athenian court of Heliaia. In particular, Xanthias, the slave, pretending that he is the master and Dionysus is the slave says to Aeacus the following words: «I swear by God I'm willing to die, if ever I came here before, or stole anything of yours that's worth a hair. And I'll do the noble thing by you. Here, take this slave of mine, and torture him, and if you find that I've done wrong, take me out and kill»<sup>17</sup>. When Aeacus asks about the way of torture – καὶ πῶς βασανίσω; – Xanthias gives the following response: «Every way; tie him to a ladder, hang him, flog him with spikes, flay him, twist him, pour vinegar up his nose, pile up loads of bricks, everything else except. Don't beat him with a leek or tender onion»<sup>18</sup>. Through this dialogue, it is clear that as far as the procedure was concerned, any person might offer his own slave to be examined by torture or demand that of his adversary, and the offer or demand for a slave to be tortured was called *proklesis eis basanon*<sup>19</sup>.

If the opponent denied giving up his slave to be examined, such a denial acted against him. The challenge to torture, appears to have been made in writing<sup>20</sup>, and it was delivered to the opponent in the presence of witnesses. Despite the several types of torture, the litigant who made the challenge to torture specified the particular type of torture. Sometimes, when a person offered his slave for torture, he gave his opponent the opportunity to choose the kind of torture. The two parties usually supervised the whole procedure. However, despite the fact that the challenge of a slave to torture is affluently cited in the sources, there are scholars who claim that *proklesis eis basanon* was rarely taken up<sup>21</sup>.

### *The offence of a slave's abuse*

An offence which is cited by Aeacus in this play is the abuse of a slave: «That offer's fair. So if I beat the slave and cripple him, I'll pay for damages». According to the Athenian law, in case a slave was abused by a third person, then a public suit (γραφὴ ὕβρεως) could be submitted against him. This is explicitly shown by Demosthenes: «Law: If anyone assaults any child or woman or man, whether free or slave, or commits any unlawful act against

16 LANNI (2016), pp. 87-88.

17 Aristoph. *Frogs*, 615-620.

18 Aristoph. *Frogs*, 622-626.

19 HERMAN (2006), p. 301; CAREY (2012), p. 17.

20 BISCARDI (1998), p. 423.

21 THÜR (1977), pp. 59-60; TODD (1990), p. 34; ΑΔΑΜ-ΜΑΓΝΗΣΑΛΗ (2008), p.168.

anyone of these, any Athenian citizen who desires so to do, being qualified, may indict him before the judges; and the judges shall bring the case before the Heliastic Court within thirty days from the date of the indictment, unless some public business prevents, in which case it shall be brought on the earliest possible date. Whomsoever the Court shall condemn, it shall at once assess the punishment or the fine which he is considered to deserve. In all cases where an indictment is entered, as the law directs, if anyone fails to prosecute, or after prosecution fails to obtain one fifth of the votes of the jury, he shall pay a thousand drachmas to the Treasury. If he is fined for the assault, he shall be imprisoned until the fine is paid, provided that the offence was committed against a freeman».

Demosthenes also justifies the reason why even a slave deserved this legal protection by the Athenian state: «Indeed he went to such extreme lengths that even if a slave was assaulted, he granted him the same right of bringing a public action. He thought that he ought to look, not at the rank of the sufferer, but at the nature of the act, and when he found the act unjustifiable, he would not give it his sanction either in regard to a slave or in any other case. For nothing, men of Athens, nothing in the world is more intolerable than a personal outrage, nor is there anything that more deserves your resentment»<sup>22</sup>. So, when Aeacus seems willing to pay for the abuse of the slave, he implies that he will comply with the jurors' decision, paying the imposed fine.

### *The offence of the ancestors' abuse*

When Heracles describes the conditions that he met when he was in Hades, he says: «Then a great slough of ever-flowing dung, and in it lie any who (...) thrashed his mother, or smacked his father's jaw»<sup>23</sup>. According to the playwright, the perpetrators of the parents' abuse suffered into the dung in the underworld. Of course, this was not their only punishment. It is common knowledge that Athenian descendants were legally required to provide whatever their ancestors needed, treating them with respect and care<sup>24</sup>. This obligation could be divided into four categories: a) provision of nutrition; b) provision of accommodation; c) abstention from physical or psychological abuse; and finally, d) posthumous honors.

<sup>22</sup> Demosthenes 21.47 and 21.46.

<sup>23</sup> Aristoph. *Frogs*, 145-149.

<sup>24</sup> RHODES (1993), p. 629.

In case the descendant violated these obligations, he committed the abuse of his ancestors. This was an offence which was punished by the Athenian state, that's why anyone could initiate a public action (*graphe*)<sup>25</sup> against the person who violated the rights of his ancestors (τὸ ἐξεῖναι τῷ βουλομένῳ τιμωρεῖν ὑπὲρ τῶν ἀδικουμένων). The name of this particular public action was *graphe kakoseos goneon*. According to Demosthenes<sup>26</sup>: «If any man be put under arrest after being found guilty of ill-treating his parents or of shirking service, or for entering any forbidden place after notice of outlawry, the Eleven shall put him into prison and bring him before the Court of Heliaea, and any person being a lawful prosecutor may prosecute him. If he be found guilty, the Court shall determine what penalty, corporal or pecuniary, he shall suffer; and if the penalty be pecuniary, he shall be kept in prison until he has paid the fine».

Aside from this public action, the perpetrators of this offence were obstructed from public speaking, according to Aeschines<sup>27</sup>: «Who then are they who in the lawgiver's opinion are not to be permitted to speak? Those who have lived a shameful life; these men he forbids to address the people. Where does he show this? Under the heading "Scrutiny of public men" he says, "If any one attempts to speak before the people who beats his father or mother, or fails to support them or to provide a home for them"». Aeschines<sup>28</sup> gives the answer for this obstruction: «And right he is, by Zeus, say I! Why? Because if a man is mean toward those whom he ought to honor as the gods, how, pray, he asks, will such a man treat the members of another household, and how will he treat the whole city?». So, the perpetrator of this offence received a severe punishment both during his life and also eternally in the underworld, according to Aristophanes.

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25 Aristotle *Athenian Constitution*, 9.1: «And the three most democratic features in Solon's constitution seem to be these: first and most important the prohibition of loans secured upon the person, secondly the liberty allowed to anybody who wished to exact redress on behalf of injured persons, and third, what is said to have been the chief basis of the powers of the multitude, the right of appeal to the jury-court for the people, having the power of the vote, becomes sovereign in the government».

26 Demosthenes 24.105.

27 Aeschines 1.28.

28 Aeschines 1.28.

*The offence of bribery*

The Chorus of the play quotes certain categories of persons who had to avoid taking part in the sacred dances. Among them, they were the public officials who received bribes especially when they exercised their duties in Athens: «Let him be mute and stand aside from our sacred dances (...) whoever takes bribes when guiding the state through the midst of a storm»<sup>29</sup>. The Greek word for bribery was δωροδοκία, which meant the action of receiving gifts for a bad outcome. According to the Athenian law, the Athenian who received or gave bribes undermining the city, lost his political rights and his property was confiscated: «If any Athenian accepts a bribe from another, or himself offers it to another, or corrupts anyone by promises, to the detriment of the people in general, or of any individual citizen, by any means or device whatsoever, he shall be disfranchised together with his children, and his property shall be confiscated»<sup>30</sup>.

Furthermore, there was also an Athenian law against bribing judicial bodies: «If any man enter into a conspiracy, or join in seeking to bribe the Heliaea or any of the courts in Athens, or the Senate, by giving or receiving money for corrupt ends, or shall organize a clique for the overthrow of the democracy, or, while serving as public advocate, shall accept money in any suit, private or public, criminal suits shall be entered for these acts before the Thesmothetae»<sup>31</sup>. Both laws explicitly show that the Athenian state was interested in fighting incidents of corruption. Δωροδοκία was an action which was punishable by the Athenian state but also led to the exclusion from the sacred dances as the Chorus of the play emphatically underlines: «All these I warn, and twice I warn, and thrice I warn again, stand aside from our mystical dances»<sup>32</sup>.

*The offence of theft*

Pandokeutria (the first hostess) cites an incident of theft in the play: «Plathane, Plathane, come here! Here's the villain that once came to our inn. And ate up sixteen loaves»<sup>33</sup>. Xanthias comments: «Now he is in for

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29 Aristoph. *Frogs*, 354-361.

30 Demosthenes 21.113.

31 Demosthenes 46.26.

32 Aristoph. *Frogs*, 369-370.

33 Aristoph. *Frogs*, 549-551.



it»<sup>34</sup> (δώσει τις δίκην). Later on, Aeacus states: «Tie up this dog thief. Get a move on too- so we can punish him (ἵνα δῶ δίκην). Be quick about it»<sup>35</sup>. Aristophanes, uses the legal term δίκην δίδωμι which means being punished for the illegal action which took place. It is not weird that Athenians preferred to initiate a trial by submitting a private suit (δίκη) even for valueless things. The victim of theft had the right to initiate δίκη κλοπῆς. Demosthenes<sup>36</sup> cites the law concerning the theft: «If a man has recovered the property lost, the penalty shall be twice the value of such property; if he has not recovered it, ten times the value in addition to the lawful amercement. The thief shall be kept in the stocks for five days and five nights, if an additional penalty is awarded by the court; and such additional penalty may be proposed by anyone, when the question of sentence is raised». Xenophon<sup>37</sup> cites the case of the thief who was caught in action: «For it is written: “thieves shall be fined for their thefts” and “anyone guilty of attempt shall be imprisoned if taken in the act, and put to death”. The object of these enactments was clearly to make covetousness unprofitable to the offender».

### *The law of naturalization*

The theme of the Athenian naturalization is indirectly cited in the comedy. According to Plutarch<sup>38</sup>: «But the law concerning naturalized citizens is of doubtful character. He permitted only those to be made citizens who were permanently exiled from their own country, or who removed to Athens with their entire families to ply a trade. This he did, as we are told, not so much to drive away other foreigners, as to invite these particular ones to Athens with the full assurance of becoming citizens; he also thought that reliance could be placed both on those who had been forced to abandon their own country, and on those who had left it with a fixed purpose». But in 406 b.C. Athens looked for people who would be willing to take part in the seabattle against Sparta. This was the reason why the Athenian state decided to grant the citizenship<sup>39</sup> to all persons who were positive to be enlisted to the navy. Through this gen-

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34 Aristoph. *Frogs*, 554.

35 Aristoph. *Frogs*, 605-606.

36 Demosthenes 24.105.

37 Xenophon *Economics*, 14.5.

38 Plutarch *Solon*, 24.2.

39 MacDOWELL (1978), p. 83.

erous offer, there was a great number of men, including slaves who finally managed to become Athenian citizens.

This is explicitly shown when Dionysus persistently teases Xanthias and the latter one says: «Unhappy wretch! Why didn't I join the navy? Then I'd tell you to whistle a different tune!»<sup>40</sup>. It is clear that Xanthias responds to Dionysus in an angry manner stating that if he had been enlisted in the Athenian navy and had actually taken part in the seabattle of Arginousai, he would have been treated by Dionysus in a different way. This fact is also reinforced by the members of Chorus who state: «But letting up on your anger, you who are wisest in nature, let's gladly make everyone our kinsman and full-fledged citizens too, who's ever fought for us at sea»<sup>41</sup>. It is explicitly stated that the benefit of the Athenian state was to grant the Athenian citizenship to everyone who fought in the sea, who was a member of the crew of the Athenian ships and contributed to the Athenian victories. These citations apparently show that despite the Athenian law, urgent conditions could justify the decision of the Athenian state to grant the Athenian citizenship to certain categories of persons, like metics or even slaves.

Taking advantage of the fact that slaves became citizens, Aristophanes claims that it was not fair to keep punishing with disfranchisement (*atimia*) those soldiers who had supported the regime of Four Hundred and had been misled by Phrynichus<sup>42</sup>: «It's just and proper in this city our sacred chorus give advice and teach. So first it seems appropriate to us to free the citizens from inequalities — to ease their fears. So if a man slips up thanks to the wrestling tricks of Phrynichus, I say we should allow the ones who fall to state their case, reform their evil ways. Besides that's no dishonor to our city. It would bring benefits. It's scandalous that those who fought a battle once at sea should instantly become Plataeans, masters instead of slaves. I don't deny this worked out well — in fact, I praise it. It's the only well-intentioned thing you did. But as well as this it stands to reason we should forget the single blow of fortune of those who fought so much at sea beside you, just like their fathers, your ethnic kinsmen — that's what they keep requesting. But you here, whom nature made the wisest of all people, should drop your anger and make everyone who fights alongside us at sea a kinsman, a citizen. For if we are too proud, too puffed up with self-worth, especially

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40 Aristoph. *Frogs*, 33-34.

41 Aristoph. *Frogs*, 700-701.

42 Harris (2010), p. 7.

now, when we're encircled by the sea's embrace, in future time we'll look like total fools»<sup>43</sup>.

The proposal of Aristophanes was adopted, that is why when Patrocleides<sup>44</sup> proposed the restoration of full rights to those who were *atimoi*, the Assembly passed this proposal, as Andocides<sup>45</sup> states: «By this decree you reinstated those who had lost their rights; but neither the proposal of Patrocleides nor your own enactment contained any reference to a restoration of exiles. However, after you had come to terms with Sparta and demolished your walls, you allowed your exiles to return too». But, as Slater<sup>46</sup> underlines, even if this goal was achieved, that alone was not enough to rebuild the participatory democracy Aristophanes dreamed of.

### *The law of excellence in arts*

Aristophanes cites in the *Frogs* a law of the underworld which granted certain privileges to those dead persons who excelled in arts. As a consequence, the dead persons took advantage of the law's benefits: «There's a law (*νόμος*) in these parts that in the arts – the great and worthy ones – the best man in his special area gets all his meals for free at City Hall (*ἐν πρυτανείῳ*) in the chair of honor next to Pluto». This law of Hades is similar to the Athenian law which granted the benefit of dining to Prytaneion to honored persons<sup>47</sup>: «What, then, does such a man as I deserve? Some good thing, men of Athens, if I must propose something truly in accordance with my deserts; and the good thing should be such as is fitting for me. Now what is fitting for a poor man who is your benefactor, and who needs leisure to exhort you? There is nothing, men of Athens, so fitting as that such a man be given his meals in the prytaneum. That is much more appropriate for me than for any of you who has won a race at the Olympic games with a pair of horses or a four-in-hand. For he makes you seem to be happy, whereas I make you happy in reality; and he is not at all in need of sustenance, but I am needy. So if I must propose a penalty in accordance with my deserts, I propose maintenance in the prytaneum»<sup>48</sup>.

43 Aristoph. *Frogs*, 686-705.

44 HENDERSON (2002), p.3.

45 Andocides 1.80.

46 SLATER (2002), p. 206.

47 BUIS (2014), p. 330.

48 Plato *Apology*, 36c-37a.

*The Athenian's legal obligations towards the city*

Euripides mentions the proper attitude of an Athenian citizen towards the state: «I hate a citizen who helps his native land by seeming slow, but then will quickly inflict injuries which profit him but give our city nothing»<sup>49</sup>. Every citizen in ancient Athens was obliged to have an active role towards the Athenian state. He had to contribute to the well being of the polis (city) through his interest in the preservation and the continuation of the oikos<sup>50</sup> (family) which could be characterized as the vital cell of the polis<sup>51</sup>. Furthermore, he had to actively take part in the public institutions such as the court of Heliaia and the Assembly. He also had to abstain from actions that undermined the foundations of the city. In case an Athenian violated the latter obligation, he faced the penalties of law. In particular, Hyperides<sup>52</sup> cites: «“If any person”, it says, “seeks to overthrow the democracy of the Athenians”. Naturally, gentlemen of the jury; for a charge like that admits of no excuse from anyone nor of an oath for postponement. It should come directly into court. “Or if he attends a meeting in any place with intent to undermine the democracy, or forms a political society; or if anyone betrays a city, or ships, or any land, or naval force, or being an orator, makes speeches contrary to the interests of the Athenian people, receiving bribes”». Xenophon<sup>53</sup> also adds: «If anyone shall be a traitor to the state or shall steal sacred property, he shall be tried before a court, and if he be convicted, he shall not be buried in Attica, and his property shall be confiscated». This was the legal framework which contributed to the stability of Athens.

*Additional legal terms of the play*

Aside from the above specific legal references, the play *Frogs* includes a wide range of legal terms. Some indicative examples are the following: *to swear* (ὀμόσαι; «a mind that will not swear on sacred offerings but a perjured tongue that's false with no sense of its perfidy»)<sup>54</sup>, *an oath*<sup>55</sup> (τὸν ὄρκον;

49 Aristoph. *Frogs*, 1427-1428.

50 SEALEY (1994), p. 15.

51 BLOK (2017), p. 103.

52 Hyperides 4.7-8.

53 Xenophon *Ellinika*, 1.7.22.

54 Aristoph. *Frogs*, 100-102.

55 FLETCHER (2012), pp. 2-3.

«On those conditions I accept your oath»<sup>56</sup>, *a false oath* (ἡ ἑπίορκον ὄρκον; «swore false oaths»)<sup>57</sup>, *the perjurers* (τοὺς ἐπίορκους; «Did you see the men who beat their fathers or perjurers?»)<sup>58</sup>. Furthermore: the verbs *to accuse* (αἰτιάσομαι; «Which god shall I accuse of thus destroying me?»)<sup>59</sup>, *to prove* (ἀποδείξω; «All right. I'll prove how bad he is at them»)<sup>60</sup>, *to decide* (κρίνοις ἄν; «You should decide»)<sup>61</sup>, *to hire* (μισθωσαί; «hire one of them – someone carrying the corpse»)<sup>62</sup> and *to deceive* (ἐξαπατήσῃ; «if he deceives them with a speech like that Dionysus»)<sup>63</sup>, and the nouns: *the jury* (ὁ δικαστής; «Yes, but jury members wolf down all the cash»)<sup>64</sup>, *the outrage* (ὑβρις; «It's an outrage, sheer insolence»)<sup>65</sup>.

## 5. Conclusions

To conclude, *Frogs* by Aristophanes is undoubtedly a profoundly rich play that includes not only literary, comic and social elements but also elements of legal, historic and political nature. All these are blended perfectly and are presented in a manner which attracts the attention of every scholar no matter what his discipline is. This is the reason why this play is the field where history of law meets other humanities. This interrelationship among law, history and politics is so strong in *Frogs* that one field affects significantly the other and all of them aim to present the core message of the play which is the pure hope of a renewal and resurrection of Athens both in the political and military field and also in the poetic field. Maybe this optimistic message was the crucial factor that led *Frogs* to the first prize, since this was what the polis desired.

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56 Aristoph. *Frogs*, 589.

57 Aristoph. *Frogs*, 150.

58 Aristoph. *Frogs*, 273-274.

59 Aristoph. *Frogs*, 310.

60 Aristoph. *Frogs*, 1250-1251.

61 Aristoph. *Frogs*, 1467.

62 Aristoph. *Frogs*, 167-168.

63 Aristoph. *Frogs*, 1067.

64 Aristoph. *Frogs*, 1466.

65 Aristoph. *Frogs*, 21.

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## MEDICUS BETWEEN PERCEPTION AND REALITY AS PORTRAYED IN SOME NON-LEGAL SOURCES

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### 1. *Perception of medici*

Considered through the lens of *Plinius Secundus Iunior*, «the doctor is worse than the disease itself» (*Medicina Plinii pr 1*). This strong statement placed at the very beginning of his compilation of healing methods and recipes, the *Medicina Plinii*<sup>1</sup>, describes his experience with doctors as frauds, who either sold false medications or treated diseases that they did not understand. At the same time, the author declared his intention to publish a book for self-medication with the sole purpose of avoiding a treatment by a doctor. This consideration of Pseudo-Pliny is not an isolated assumption but a small piece of the mosaic that reflects the opinion of Roman society towards the medical profession.

One of the most famous criticisms of doctors was centuries earlier expressed in the encyclopedic work *Naturalis Historiae* by the former's role model Pliny the Elder, who regretfully reported that negligent doctors were only rarely brought before a court: «There is no law that would punish the ignorance of physicians. Physicians acquire their knowledge from our dangers, making experiments at the cost of our lives. Only a physician can commit homicide with complete impunity» (*Nat. Hist.* 29,8). The image of a doctor painted by Pliny is almost the opposite of the Hippocratic ideal, where the well-being of the patient is priority. This was obviously not a rare occasion, since Cicero noted in his philosophical dialogue *On the Nature of the Gods* that physicians were often mistaken («Medici quoque saepe falluntur», *De Natura Deorum* 3,6,15). These lines could lead to a conclusion that doctors

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1 *Medicina Plinii* is a collection of more than 1150 healing methods and recipes compiled probably in the 4<sup>th</sup> century A.D. The three books contain medical advice taken over mostly from the 200 years older *Naturalis Historia*, written by Gaius Plinius Secundus the Elder. The author Plinius Secundus the Younger (who should not be confused with Pliny the Elder's homonymous nephew) is sometimes referred to as Pseudo-Pliny, since it is believed that he used the reputable and distinctive name *Plinius* in order to add authority and credibility to his work. For more information s. *Medicina Plinii*, p. 9.

simply buried their mistakes, and that there were no legal mechanisms for patients to seek compensation against negligent or incompetent doctors. Since the motive of a doctor as a non-penalized assassin is a frequent stereotype, widespread and shared by many diverse cultures<sup>2</sup>, the legal validity of such perspective needs to be questioned.

The paradigm that the doctors were considered dishonest and unqualified charlatans, which is mirrored in the literary sources, has an additional foothold in numerous grave inscriptions. In the epitaph of *Publius Aelius Peculiaris* (CIL VI 37337), a freedman of Hadrian's lamented the death of his foster-son, an innocent soul (*anima innocentissima*), whom the doctors had allegedly killed by a surgical procedure («quem medici secarunt et occiderunt»)<sup>3</sup>. At the grave of *Aurelia Deccia* (CIL III 3355), her husband complained in grief that the death of the 28-year-old woman was caused by doctor's negligence («per culpam curantium»)<sup>4</sup>. Senator *Flavius Maximinus* built a monument (CIL III 14188) to his 5-year-old son *Octemus*, who died under the knife of a doctor<sup>5</sup>.

Therefore, this paper aims to call into question critical literary statements and to examine whether *medici* deserved the bad reputation that they were associated with. By reconstructing the legal framework and liability of the Roman *medicus*, the focus will be placed on an analysis of the available legal sources in order to clarify what is behind the label that portrays a doctor who misuses his position of trust and acts contrary to the Hippocratic ideal that was already well established in ancient Greece.

## 2. Origin and social status

The Roman background of *medicina domestica* and its incompetence to cure diseases adequately enabled Greek medicine to become an essential part

2 Cf. KUDLIEN (1970), pp. 97-107.

3 «D(is) M(anibus) / Euhelpisti lib(erti) qui et / Manes vixit annis XXVII / mens(i-bus) IIII dieb(us) XI floren/tes annos mors subita / eripuit anima inno/centissima quem / medici secarunt / et occiderunt / P(ublius) Aelius Aug(usti) lib(ertus) Peculiaris / alumno suo», in GUMMERUS (1932), p. 48, n. 164.

4 «Feminae rarissim[ae] ac pudicissimae, cuius mortem dolens per absentiam mei contigisse per culpam curantium conqueror, vix(it) an(nis) XXVII m(ensibus) Xdieb(us) XXIII», in GEIST, PFOHL (1976), p. 105, n. 272.

5 «Fla(vius) Maximinus scutarius sinator levavi statu filio meo Octemo, vixit annos V dies XV precisus a medico. (H)ic pos(i)tus est ad martures», GEIST, PFOHL (1976), p. 105, n. 274.

of the Roman culture<sup>6</sup>. The primitive beginnings of indigenous Roman medicine were shortly taken over by the immigrant Greek physicians<sup>7</sup>. Although various inscriptions indicate that most physicians had Greek names, and that medicine was usually practiced by slaves<sup>8</sup> or freedmen<sup>9</sup> of Greek or Oriental origin (*ingenui* seem to have joined the medical profession later)<sup>10</sup>, we have to agree with Kudlien who conducted a detailed study on the social position of physicians and indicated numerous examples of Jewish, Galician and African doctors, strictly opposing the prevalent stereotypes and blanket judgements that doctors were exclusively of Greek origin and of the lowest status<sup>11</sup>. Grotefend, who investigated the Roman oculist stamps, only further supported this thesis by concluding that, according to their *cognomina*, half of the doctors were slaves and freedman of Greek origin, but interestingly a large amount of other stamps belonged to oculists of Celtic origin (*Ariovistus*, *Cintusminius*, *Catodus*, *Murranus*, etc.)<sup>12</sup>.

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6 Despite the fact that the profession was imported to Rome, we cannot completely agree with Schultze's statement that «medicine remained a foreign body in the domain of Roman science». See SCHULZE (1971), p. 485. In fact, over time it became so naturalized that that the profession was cultivated not only by immigrant Greeks, who later acquired Roman citizenship, but also by Roman citizens, even those of higher social status. Cf. WACKE (1996), pp. 394 ss. NUTTON (2013), p. 157 considers the transplantation of Greek medicine into the Roman system as «one of the most momentous developments in the history of medicine», otherwise it is uncertain if it would become the basis of the Western medical tradition.

7 Contrary to their Roman colleagues, as respectable free men, medical practitioners in Greece enjoyed immense reputation. Already in *Iliad* and *Odyssey*, Homer repeatedly emphasized that the medical profession was highly valued and practiced by heroes: «A wise physician skill'd our wounds to heal, is more than armies to the public weal» (*Iliad* 11,635). On the position of Greek physicians see WATSON (1856), pp. 18 ss; OEHLER (1908), pp. 13-14; KOELBING (1977), p. 177; KUDLIEN (1979a), pp. 10 ss.

8 Cf. e.g. CIL V 869: «Ph(o)ebiano ser(vo) medico Fabianus co(n)s(ularis)»; Seneca *De Const. Sap.* 1,1; Varro *Rer. Rustic.* 1,16,4.

9 Cf. e.g. CIL VI 3869: «[—]ulus l(ibertus) [Au]g(usti) l(ibertus) Hilarus [medic(us) chirurg(us) [—]»; *Iul.* D. 38,1,25 & 27; *Ulp.* D. 38,2,14,7; *Scaev.* D. 40,5,41,6.

10 Cf. e.g. CIL VII 690: «D(is) M(anibus) Anicio Ingenuo medico ord(inario) coh(or)tis) I Tungr(orum) vix(it) an(nos) XXV».

11 KUDLIEN (1986), pp. 46 ss. According to NUTTON (2013), p. 165, only 10% of doctors recorded epigraphically before 100 AD in Italy and other western provinces were Roman citizens; over 75% were either slaves or libertini; and fewer than 5% had non-Greek names.

12 GROTEFEND (1867), p. 5. For inscriptions in the provinces of Germania see RÉMY (1996), pp. 133 ss.

The first arrival of the Greek doctor Archagathus in Rome in 219 B.C. was documented by Pliny the Elder, who indicated that the response of the Roman culture to foreign medicine was marked both by enthusiastic reception and fearful hostility and rejection. Pliny explains that Archagathus was greatly welcomed at first as *vulnerarius*, but that soon afterwards, due to the cruelty he displayed in cutting and searing his patients, he gained the new name of *carnifex* and brought his art and physicians in general into considerable disrepute (*Nat. Hist.* 29,6).

The encounter with Greek medicine provoked even more anti-Hellenic prejudice, whose main exponent was Cato the Elder, who practiced medical care by relying on his own remedies and suspected that Greek influence could endanger the moral essence of the society<sup>13</sup>. In his biography of Cato, Plutarch explained that he was suspicious of Greeks who practiced medicine in Rome. He even claimed that the Greeks had sworn to murder all the Barbarians with their medicine and they even demanded money so that nobody noticed it right away<sup>14</sup>. According to Böck and Nutton, these polemics against Greek medicine were surely a combination of truth, politics and literary stereotypes but have, nevertheless, continued to exert influence, especially with regard to the implication that Greek medicine had an inferior role in Roman society<sup>15</sup>.

Galen, a prominent Greek physician, surgeon and philosopher, reflecting upon the social status of doctors, wrote with aversion: «In ancient times [...] kings educated their sons in this (art), and at that time, none of them had ever thought it was shameful to take up this art of Apollo and Asclepius. At present, its status has declined; it is suitable (only) for slaves and despicable men»<sup>16</sup>.

A well-known and highly disputed review of the status of the medical profession was given by Cicero (*De Officiis* 1,151), according to whom medicine was an honorable career, but only for persons *quorum ordini convenient*. The concept of *artes liberales*, as an occupation that implies qualified education

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13 Cf. Cato *De Re Rustica* 160.

14 Cf. Plutarch *Cato maior* 23,3; Plinius *Nat. Hist.* 29,6,

15 Böck, NUTTON (2009). Meyer argues that this change in the perception of Greek medicine was largely due to the political repercussions put into action by national-minded Romans against the influence of Greek society. See MEYER (1907), p. 16. It is important to note that not only Greek doctors had difficulties with acceptance by Roman society. Neither the rhetors nor the professors underwent less obstacles. For further details see HERZOG (1935), p. 979.

16 YANKELL (2014), p. 28.

and brings great benefit to humanity, was however a social convention, not a part of any legal classification<sup>17</sup> and did not depend on the intellectual or manual nature of the work, but on the status of the particular person who carried out the activity<sup>18</sup>.

After Caesar granted citizenship to foreign doctors (46 B.C.), a privilege documented by Suetonius<sup>19</sup>, the situation started to change. From the 1<sup>st</sup> century onwards, doctors, as well as grammarians, rhetors and philosophers, enjoyed a certain immunity<sup>20</sup>. This not only attracted more doctors from Greece<sup>21</sup>

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17 Alfenus (D. 38,1,26 pr) mentions the phrase *liberas operas* concerning a dilemma whether a patron physician is allowed to forbid his freedman to render medical services. Ulpian (D. 50,9,4,2) discusses a situation where decurions are allowed to pay *liberalem artem*, especially the doctors, from the community money.

18 An insight into which occupations were considered as *artes liberales* is given by Ulpian (D. 50,13,1, pr-1) enumerating certain professions (teachers, rhetors, grammarians, geometricians) that could assert their claim in the procedure *extraordinaria cognitio*. Other *opifices* were, according to Ulp. D. 50,13,1,7, directed to initiate a regular legal procedure, thus drawing a clear line between higher intellectual and manual professions. For proponents of the disputed issue whether the *ars medica* could be incorporated into the *artes liberales* see HELDRICH (1940), p. 143; SIBER (1940), pp. 161 ss.; ERDMANN (1948), p. 570; BELOW (1953), pp. 57 ss.; LÜBTOW, VON (1957), p. 618; KASER (1971), p. 569; KUDLIEN (1986), pp. 39-40; WACKE (1996), p. 405; ŠARAC (2010), pp. 496-512. Contrary to the prevailing doctrine, for claims that medicine cannot be categorized as an *ars liberalis* see VISKY (1977), pp. 73-94.

19 Suetonius *Divius Iulius* 42: «Omnisque medicinam Romae professores et liberalium artium doctores, quo libentius et ipsi urbem incolerent et ceteri adpeterent, civitate donavit».

20 These privileges included exemption of all public duties and levies (*Tarrunt*. D. 50, 6, 7; *Imp. Const.* C. 10,53,6), tax burdens and billeting (Ulp. D. 50,4,18,30), as well as exclusion from guardianship and curatorship (*Mod.* D. 27,1,6,1). Furthermore, *immunitas* meant that doctors could not be forced to furnish supplies (corn, wine or oil), they could not be compelled to preside in court, or act as deputies, or be enrolled in military, or, against their consent, be subjected to any other public service (*Mod.* D. 27, 1,6,8). At the same time, they were allowed to form legitimate associations (*Collegium Aesculapi et Hygiae*). Regarding a more detailed analysis of *immunitas* see Gummerus (1932), pp. 6 ss.; HERZOG (1935), pp. 973-1019; BELOW (1953), pp. 22 ss.; VISKY (1977), pp. 90 ss.; WACKE (1996), p. 405; NUTTON (2013), p. 164 suggested that various grants of immunity awarded by emperors were not always appreciated by Roman taxpayers, who had to take over doctors' exemptions.

21 Asklepiades from Prusa in Bitinia, the founder of the Methodist School, came to Rome around 91 B.C. and due to his comprehensive education gained access to the high-

but also motivated the locals to pursue this profession, which resulted in the fact that more and more Romans consulted physicians<sup>22</sup>. Their status varied depending on the place of practice and was influenced largely by the status of their patients. Those who treated the imperial family or senators enjoyed a certain prestige and earned more money than regular medical practitioners<sup>23</sup>. The advancements in the medical profession also reflected in the progressive specialization of the profession<sup>24</sup>.

The consequences of the non-national character of the profession and its social position inevitably had a profound effect on the status of the medical art. Nonetheless, the medical profession was not limited to a single social class and did not determine the social status from the outset, but rather the personal social prestige possibly helped to influence the societal assessment of the profession<sup>25</sup>.

### 3. Professional education and compensation

As far as professional development and education are concerned, unfortunately for the Romans, the physicians often had no professional training, and Roman society regularly perceived them as frauds<sup>26</sup>. The absence of general

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est classes and fundamentally changed the Roman view of Greek medicine. Cf. MEMMER (2006), pp. 202-203; NUTTON (2013), pp. 167 ss.

22 It is not surprising that, parallel to the development of the medical science in the 1<sup>st</sup> century, the need for prosecution of negligence was introduced. Cf. *infra Liability for malpractice*.

23 According to Cassius Dio (*Hist. Rom.* 53,30,3), the emperor Augustus, although being ill with no chance of cure, recovered after the treatment by his doctor Antonius Musa, who apparently «restored him to health by means of cold baths and cold potions. For this, Musa received a great deal of money from both Augustus and the senate, as well as the right to wear golden rings (for he was a freedman), and he was granted exemption from taxes, both for himself and for the members of his profession, not only those living at the time but also those of future generations».

24 E.g. *ocularius* (CIL VI 8909, *Cic. de leg* 2,24,60), *auricularius* (CIL VI 8908), *chirurgus* (CIL VI 3869), *clinicus* (CIL VI 2532), *medicus castrensis* (CIL VI 31172), *medicus dentalis* (*Ulp. D.* 50,13,1,3), *obstetrix*. Martial mentions several well-known physicians of his time: dentist *Cascellius*, oculist *Hyginus*, surgeons *Eros* and *Fannius* (*Epigrammata* X, 56), as well as surgeon *Alcion* (*Epigrammata* XI, 84,5). For a detailed analysis see BAADER (1967), pp. 231-238.

25 Cf. KUDLIEN (1986), p. 42.

26 How easy it was to become a doctor can be seen from Galen's complaint about

medical knowledge throughout the prevailing population, on the other hand, allowed almost anyone to appropriate the profession of a physician<sup>27</sup>. Galen noted: «When wicked men realized how stupid others could be, they found it unnecessary to obtain any medical instruction in order to acquire skill and dexterity» (*De Optimo Medico Congnoscendo* 1.8). This situation was not left unnoticed by Martial, the greatest satirist of the Roman Empire, who usually emphasized the moral weaknesses of his contemporaries and did not spare doctors in his mockery: «Until recently, Diaulus was a doctor; now he is an undertaker. He is still doing as an undertaker, what he used to do as a doctor» (*Epigrammata* 1.47), and «You are now a gladiator, although until recently you were an ophthalmologist. You did the same thing as a doctor that you do now as a gladiator» (*Epigrammata* 8.74).

Polybius, on the other hand, expressed his skepticism against ‘theoretical’ doctors: «pilots who steer by book», who «impress by their rhetorical powers» and whose «persuasiveness or eloquence often prevail against the testimony of practical experience» (*Histories* 12,25d, 2-7). Although he acknowledged that the study of the theory of disease is indeed an integral part of medicine, he condemned the pretentious professors who «give themselves such an air of superiority that one would think no one else was master of the subject», but «yet when you make them confront reality by entrusting a patient to them you find them just as incapable of being of any service as those who have never read a single medical treatise».

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the methodologist Thessalos, who claimed to be able to train a perfect doctor within six months (*De meth. Med.* 10, 5; 19 K). That education could prove to be great capital investment was demonstrated by Romans who medically trained their slaves and tripled their market value. It is clear that this could have been only simple practical training. To avoid any doubts about the price of slaves in 530, Justinian issued a constitution (C. 7,7,1,5), according to which the doctor’s price was established at up to sixty solidi. See also VISKY (1977), p. 74; KOELBING (1977), p. 189; FISCHER (1979), pp. 169 ss.; WACKE (1996), p. 398.

27 Pliny’s statement that the Romans had no doctors over six hundreds years but still had medicine (*Nat. hist.* 29.6) is based on the fact that the *pater familias*, who had the authority over the family, applied self-help and practical knowledge of home remedies. This patriarchal medicine described by Cato in *De Re Rustica* 156-162 was home medicine, based on healing herbs and superstition. Due to lack of doctors, there was a multitude of gods that would be addressed in case of illness (e.g. in the circumstance of fever, the goddess *Dea Salus*, *Dea Fibris*, or *Mephitis*). The Roman contribution to health care lay, however, in a completely different aspect, namely in the development of sanitary facilities. Cf. ELLIOTT (1914), pp. 8 ss.; KOELBING (1977), p. 185; ACKERKNECHT (1979), p. 73; YANKELL (2014), pp. 19 ss.; ZIMMERMANN (1996), p. 390 nt. 37.



Even after the position of doctors changed and they were rewarded for their excellence, the skepticism of some members of the Roman elite persisted. As highlighted by Juvenal's satire *Contra medicos*, written between the late 1<sup>st</sup> and early 2<sup>nd</sup> century B.C., it was due to their suspicion that a profession without clear rules was careless and improvised<sup>28</sup>. This attitude may be partly explained by the fact that Roman doctors long continued to be of Greek tradition and used Greek terminology, so that diseases, concepts, remedies initially did not have Latin names<sup>29</sup>.

The Romans' sentiment was even further enhanced by the greed demonstrated by individuals, who accepted payments even if it meant endangering patients. In Plautus's comedy *Aulularia*, or *The Concealed Treasure*, the character Lyconides complains that everything he has earned that day is not enough to pay a doctor<sup>30</sup>. Pliny clarified this phenomenon by noting that «it was not medicine itself that the forefathers condemned, but medicine as a profession (...) chiefly because they refused to pay fees to profiteers in order to save their own lives» (*Nat. Hist.* 29,8). This stereotype of a doctor as usurer, that Pliny used because of making bargains with patient's faith and framing tariffs upon their agonies, pertained and was centuries later metamorphosed in numerous literary works<sup>31</sup>.

Ulpian (D. 50, 13, 3) mentioned a case of an unscrupulous eye doctor, who used his sick patient for financial exploitation by administering drugs that may have caused him to lose his eyesight and urged him to sell him his property. Such events of luxury and greed were condemned because they were in

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28 *Satire contra medicos* 3,74-78: «(...) Proclaim what you think that man is. He has brought to us along with himself any man at all: grammar teacher, orator, architect, painter, personal trainer, fortune-teller, tightrope walker, doctor, magician – the hungry little Greek knows all things: (if) you give the order, he will go into heaven».

29 *Nat. hist.* 29,8 «Nay, even more than this, if they attempt to treat of it in any other language than Greek, they are sure to lose all credit, with the most ignorant even, and those who do not understand a word of Greek; there being all the less confidence felt by our people in that which so nearly concerns their welfare, if it happens to be intelligible to them». Cf. also LANGSLOW (2000), pp. 31 ss. and 76 ss.; ISRAELOWITCH (2015), p. 11.

30 *Aulularia* Act. 3, scen. 2, vers. 448: «It certainly was an unlucky day when I came here! Two shillings for the job, and now it'll take more than that to pay the doctor's bill».

31 The most prominent one being Molière's three-act satire of the medical profession *The Imaginary Invalid* (*Le Malade imaginaire*), published in 1674, that discusses the problem of doctors as usurers, who encouraged diseases by causing fear and psychological instability of their patients in order to enrich themselves.



direct contradiction with the respected Roman virtues, described by Celsus (*De Medicina* Pref. 4-5) as a sense of decency and moderation.

Galen, although a prominent physician himself, drew a cynical comparison between members of the medical profession and robbers, explaining that the sole difference between them was that the doctors operate in towns, and the robbers in the mountains<sup>32</sup>. In compliance with Aristotle's philosophy (*Politics* 1258a10-13), Galen made it clear that the medical ethos in antiquity already required making the care and concern for the well-being of the patient and not the financial gain its primary interest. He stated: «It is not possible to pursue the true goal of medicine if one holds wealth more honorable than virtue, and learns the [medical] *technē* not to help people, but for material gain» (*Quod optimus medicus* n. 34, p. 4, line 13 ss.)<sup>33</sup>.

Given that we accepted Cicero's categorization of medicine as *operae liberales*, was it acceptable for an occupation that benefited the humanity, required great theoretical knowledge and practical skills and represented a higher mental activity to receive payment? Although it was not appropriate for liberal arts to require reimbursement, and the request as such would have been seen as dishonorable, legal and literary sources unanimously agree that the acceptance of *honorarium* offered by the patient as compensation was regarded as honorable, because the payment of the fee did not provide an equivalent for the value of the medical assistance<sup>34</sup>. Conducting a detailed analysis related to the problem of revenues in the field of liberal arts, Kudlien eventually concluded that even Galen, as an «enthusiastic proponent of medicine as liberal art», accepted payment from his patients<sup>35</sup> because *honorarium* was considered a voluntary, economically inestimable reward, a «sustentation for purposes of science»<sup>36</sup>. The explanation was given by Cicero: «You pay them for devoting their attention to us, for disregarding their own affairs to attend to us: they receive the price, not of their services, but of the expenditure of their time» (*De benef.* VI, 15,1). The requirement for financial reimbursement of medical practitioners later became legally enforceable through

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32 *De Praenotione ad posthumum*, in KÜHN (1830): «(...) the sole difference being, the former perpetrate their crimes in towns, and the latter in the mountains».

33 KUDLIEN (1976), p. 452.

34 Cf. *Inst.* 4,5,1; *Gai.* D. 9,3,7; *Pomp.* D. 13,7,8 pr; *Ulp.* D. 17,52,4; *Cicero, de benef.* VI, 15,1 & VI, 16,1; *Seneca, de benef.* 6,17,2.

35 KUDLIEN (1976), pp. 456-457.

36 Cf. HELDRICH (1940), pp. 144 ss.; SIBER (1940), pp. 166 ss.; BELOW (1953), pp. 57 ss.; KUDLIEN (1979b), p. 4.

*extraordinaria cognitio* (Ulp. D. 50,13,1 pr), enabling the judicial discretion a significant margin to take into account the claim of the doctor, as well as the counterclaims of the patient<sup>37</sup>.

#### 4. *Liability for malpractice*

Bearing in mind that the liability for malpractice proves to be a fairly complex subject due to the peculiarity of the doctor-patient relationship<sup>38</sup>, which would require a thorough analysis of the different perspectives, we will try to outline the basic concept of doctor's civil liability<sup>39</sup>.

The encounter between Roman law and medicine took place relatively late<sup>40</sup>. Proculus, whose assessment of the matter Ulpian (D. 9,2,7,8) referred to in his book XVIII of the Edict two hundred years later, is very clear by stating that «if a doctor operates negligently on a slave (*si medicus servum imperite secuerit*), an action will lie either on the contract for his services or under the *lex Aquilia*». Liability for malpractice could therefore arise out of the contract (*actio locati*) or out of the delict (*actio legis Aquiliae*), but the legal ground changed depending on whether the doctor and the patient were *servi*, *liberti*, or *ingenui*. The fact who operated as a doctor defined the specific type of the contract, and the fact who was treated as a patient determined the liability for the delict.

The quoted Ulpian fragment makes it impossible to specify the status of the doctor to whom Proculus referred with certainty. Doctors, mostly slaves or freedmen, as previously determined, could render their services under a contract of *locatio conductio operis*, in which case their *dominus* or *patronus* would have been liable *ex locato*. The key problem of doctors' civil liability is reflected in the legal position of *medicus ingenuus*. It was by no means easy to integrate it into the existing legal construction, which is why in the classical times no uniform legal figure was formed in this area. The illusion had to be preserved that medical assistance was given deliberately, without legal

37 SIBER (1940), 189; BELOW (1953), 96-98; VISKY (1977), 84; KUDLIEN (1979b), 5.

38 About the special character and the development of the relationship between the patient and the physician see KATZENMEIER (2002), pp. 5 ss.

39 For criminal liability of a *medicus* see BELOW (1953), pp. 122-134.

40 According to available data, the first Roman jurist who dealt with issues of medical law was Alfenus Varus (D. 38, 1, 26) in the middle of the 1<sup>st</sup> century B.C. HELDRICH (1940), 141 concludes that the jurists did not have the opportunity to occupy themselves professionally with the issues concerning physicians until the last century of the Republic.

obligation and as a matter of public spirit and human gesture<sup>41</sup>. Nevertheless, there is not a single fragment in the sources that considers the legal nature between the freeborn doctor and his patient as *mandatum*<sup>42</sup>.

Since the Ulpian fragment (D. 9, 2, 7, 8) deals with the surgical procedure of a slave, concerns have arisen whether the legal position changed depending on the fact if the particular *medicus* was a scientifically educated physician or a craftsman. Some studies have focused on the fact that among medical practitioners a distinction was made between the manual work of a *chirurgus* (and other specialized doctors) and purely intellectual activities of the *clanicus*. The services of a *chirurgus* were considered *operas* which, given the circumstances, were the subject of *locatio operis faciendi*. *Medici clinici* were, according to this theory, not able to work for *merces* and were not liable *ex locato*<sup>43</sup>.

Although we completely agree that there were distinctions in the social status between *chirurgi* and *clinici*, the latter enjoying precedence and respect, contrary to the previous approach, no jurist drew a concrete legal distinction between the services of different physicians<sup>44</sup>. On the contrary, in the eighth book of *De omnibus tribunalibus*, a postclassical collection of rephrased and extended Ulpian fragments (D. 50, 13, 1, 3), the jurist widens the definition of *medicus* by including specialists, as those who promise a cure for a particular part of the body, or relief from pain (e.g. ear doctor, throat doctor, or dentist), provided they do not employ incantations, imprecations, or exorcisms, since

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41 Cf. ZIMMERMANN (1996), p. 390.

42 Furthermore, as the principle *mandatum nisi gratuitum nullum est* (Paul. D. 17,1,1,4), according to which a contract is void unless it is gratuitous, had to be strictly adhered to, by concluding a *mandatum* a doctor would not have been able to claim his *honorarium*. Besides that, WACKE (1996), p. 407 underlines that the legal nature of mandate would not correspond to the specific relationship, because *medicus* did not perform assignments for others (as, for instance, *procurator*). In addition, BELOW (1953), p. 82 argues that the character of mandate was an occasional agreement made out of courtesy (Gefälligkeitsvereinbarung), while the doctor usually pursued a permanent occupation. Cf. also VON LÜBTOW (1957), p. 618. On the contrary, *mandatum* as the legal nature of the contract with *medici ingenui* is advocated by GÓMEZ ROYO, BUIGUES-OLIVER (1990), p. 184.

43 Cf. MEYER (1907), pp. 79 ss.; VISKY (1977), pp. 81 ss.; GÓMEZ ROYO, BUIGUES-OLIVER (1990), pp. 186-187; ŠARAC (2010), pp. 497 ss.

44 Against social demotion of specialized doctors, see the research of KUDLIEN (1986), p. 165 and 181; HELDRICH (1940), p. 151; WACKE (1996), pp. 399 ss.; RIEGGER (2007), p. 39. Contrary to that VISKY (1977), p. 73 and pp. 87 ss.

such practices do not properly belong to regular medical procedures but to charlatans. Sources only delineate the capable doctor from a charlatan.

For services within *ars liberalis*, the contract *locatio conductio* did not remain unavailable<sup>45</sup>, and doctors were obviously able to work for *merces*<sup>46</sup>. Only where the social origin, in particular the higher social status<sup>47</sup>, forbade commitment to medical services in exchange for compensation, the contract was not applicable<sup>48</sup>. In order to classify the relationship between the patient

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45 Cf. activities, which constitute the object of a *locatio conductio*, as demonstrated by HELDRICH (1940), pp. 147 ss., do not exclude their recognition as *ars liberalis*. In addition, SIBER (1940), p. 198 mentioned that it were the compilers who firstly took the contracts *ars liberalis* out of the *locatio conductio*. WACKE (1996), p. 408 and 412 managed to prove that the extraordinarily widespread contract pattern of *locatio conductio* was not a reflection of social circumstances, and that the contract was compatible with the principle *operae liberales non locantur*. The same position is represented by KASER (1971), p. 569 who claims that even for services of higher ranking this contract was by no means unavailable. ZIMMERMANN (1996), p. 390 agrees that free physicians (that started to practice from the 1<sup>st</sup> century A.D.) were obviously able to work for *merces*, but their activities in general did not enjoy the same sort of prestige as the other *quaestus liberales*.

46 The fact that doctors could claim *merces ex conducto* arises *e contrario* from a fragment reconstructed according to Basilika (*Pomp. D.* 19,5,26,1 also referred to as *D.* 19,5,27) that deals with the so-called *strenae*, New Year's (*kalendis <Ianuariis>*) gifts which the Romans gave to their (family?) doctors. The source explicitly states that these contributions were not considered *merces* (*non est merces*) because they were given arbitrarily and not previously agreed upon. Therefore, in order to reclaim the gift – also HELDRICH (1940), p. 152; WACKE (1996), p. 411 – as a consequence of doctor's improper services – and not to claim indemnification in case of malpractice as suggested by BELOW (1953), p. 89 –, it was not allowed to use *actio locati* but *actio in factum* (*non ex locato, sed in factum actio dabitur*). Furthermore, Gaius gives us a proof that the doctor's compensation was called *merces* in *D.* 9,3,7, a fragment which describes a situation when a freeman had been injured by something thrown down or poured out, in which case the judge had to take into consideration the fees paid to a physician (*mercedes medicis*), and other expenses accrued during the treatment of the individual. Cf. also *Inst.* 4,5,1; *Pomp. D.* 13,7,8 pr; *Ulp. D.* 17,52,4.

47 The higher social status would commonly include the senatorial and equestrian ranks, but KUDLIEN (1986), pp. 186-189 and 210-211 advises to separate ourselves from a typical classification scheme (*Einteilungsschematismus*) concerning doctors because of the constant mobility within the Roman social structure.

48 There is no source-based evidence that the requirement of social status for doctors was incorporated into the legal system. Namely, VON LÜBTOW (1957), p. 618 provides an important observation that via *lex Cincia* there existed an explicit restraint for lawyers to

and the physician within its structure, the legal system intervened eventually with *extraordinaria cognitio*<sup>49</sup>.

The object of the contract was *opus*, a medical treatment in compliance with medical standards, not services as such, nor the success of the treatment<sup>50</sup>. The doctor does not primarily act to perform a contractual obligation, but to fulfill his professional (and ethical) duty to help the patient. By doing so, he does not need to promise a certain result or success («*medico imputari eventus mortalitatis non debet*», Ulpianus in D. 1,18,6,7). Nevertheless, he should guarantee to a certain extent that he has the necessary expertise to ensure professional standards for proper execution of the activity. Perhaps one of the reasons why doctors were portrayed in such negative perspective is the Romans' expectation that the doctor had to make the patient healthy; that his contractual obligation was to heal. Even today, due to great advancements in medicine, our own expectations have risen enormously and we tend to have the misguided idea that almost everything is possible<sup>51</sup>. However, Ulpian (D. 1,18,6,7) points out that «the event of death should not be imputed to a physician (...) he is responsible for anything caused by his lack of skill» (*ita quod per imperitiam commisit, imputari ei debet*). We witness the emergence of a very important principle according to which physician was only responsible for the treatment *lege artis*, but not for the success of the treatment. The doctor was subject to a penalty only if he damaged the health of a patient either by not using enough care *negligentia* (Ulpianus in D. 9, 2, 7, 8; Alfenus in D. 9, 2, 52, pr), or by not having the knowledge of his profession *imperitia* (Ulpianus in D. 1, 18, 6, 7)<sup>52</sup>. In particular, by regulating the position of the doctor,

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receive compensation while pleading a case, which was later on altered by a constitution of the emperor Claudius, who allowed a compensation up to 10,000 HS.

49 According to HELDRICH (1940), p. 148 and SIBER (1940), pp. 186 ss. the classics gave the *extraordinaria cognitio* only an optional character, the regular legal remedy *actio locati* was simultaneously available and not excluded. Wacke (1996), 413 draws our attention to a very important fact, namely that from the fragment *Ulp. D. 50,13,1,1* it is impossible to see that the active procedural legitimation for *extraordinaria cognitio* was reserved only for *medici ingenui*, so he concludes that there existed a long parallel dualism between *locatio conductio* and *extraordinaria cognitio*.

50 Cf. BELOW (1953), p. 111; ZIMMERMANN (1996), p. 393.

51 Cf. HONSELL (1990), p. 139.

52 ZIMMERMANN (1996), p. 1009 elaborates the *imperitia* liability as a good example of an objective approach of the Roman jurists, because physicians were not evaluated by their experience or whether they could have foreseen the consequence, but whether they pos-

legal sources emphasize the principle that ignorance is treated as negligence («imperitia culpa adnumeratur», Inst. 4, 3, 7).

Concerning the liability out of delict, Celsus mentions the abstract principle followed by Ulpian (D. 9,2,7,6) that it makes a great deal of difference whether the party actually kills (*occidere*), or provides the cause of death (*mortis causam praestare*), as he who provides the cause of death is not liable under the *lex Aquilia*, but is due to an *actio in factum*. If a doctor operated negligently<sup>53</sup> or administered a wrong drug himself<sup>54</sup>, he was liable under the *lex Aquilia* for *culpa*<sup>55</sup>. However, if he handed a drug over to the patient with the request to apply it to himself, it was not regarded as sufficient, because the death must have been the direct consequence of a physical action of himself. In case of an indirect delict, an *actio in factum* was granted<sup>56</sup>. As a particular case of liability, the sources indicate a situation where a doctor operated well but neglected the after-treatment<sup>57</sup>. A disputed and by post classics heavily altered fragment *Coll. 12, 7, 7* (*Ulp. D. 9,2,27,9*) foresaw a situation in which a doctor conducted a surgery on a slave in compliance with all medical standards, unfortunately with mortal consequences because he neglected the postoperative care. Given that the *lex Aquilia* presupposed *damnum corpore corpori datum*<sup>58</sup>, and the indirect causation already required an *actio in factum*, for the damage caused by an act of omission an *actio ad exemplum Aquiliae* was granted against a medical practitioner who treated the patient negligently, whether the latter died or was disabled<sup>59</sup>. In the Digest version of

sessed the necessary skills for their profession. Nobody could escape liability by claiming that he did not possess the required medical skills.

53 *Ulp. D. 9,2,7,8; Alf. D. 9, 2, 52, pr; Inst. 4,3,7*

54 *Gai. D. 9,2,8; Ulp. D. 9,2,9,1; Ulp. D. 47,10,15 pr; Scaev. D. 48,9,2; Inst. 4,3,7*

55 It has to be emphasized, as articulated in Kunkel's research on the Aquilian liability, that the classical jurists still did not understand the term *culpa* in a narrow sense as negligence (*Fahrlässigkeit*), but rather as fault (*Verschulden*). See KUNKEL (1925), pp. 266 ss.; KUNKEL (1929), p. 163. Cf. also MOLNAR (1998), pp. 104 ss.

56 *Ulp. D. 9,2,7,6; Ulp. D. 9,2,9 pr*

57 *Coll. 12, 7, 7; Gai. D. 9,2,8; Inst. 4,3,6*

58 *Gai. Inst. 3,219; Inst. 4,3,16; Iul. D. 9,2,51pr*

59 The Aquilian *culpa* incorporated as its key element a positive act, a commissive *culpa*, contrary to the omissive one, since the mere act of omission did not satisfy the requirements of *actio directa*. Only with *actio utilis ad exemplum legis Aquiliae* did omission play a role. However, it was not supposed to stand alone; it presupposed a previous action that created a state of danger for others, which required a repeated activity in order to prevent the imminent unlawful outcome. See WESENER (1958), pp. 224 ss.; VON LÜBTOW



the Ulpian fragment (D. 9, 2, 27, 9), the compilers replaced the term *actio-nem ad exemplum Aquiliae dare* with *utilem actionem competere*. This was, however, a purely stylistic change that had no factual meaning, because those two phrases were just two different names for the same remedy<sup>60</sup>. Nevertheless, the main difference introduced by the compilers was the deletion of the example of a doctor who neglected the aftercare because he was no longer liable by *actio utilis* but by *actio directa*<sup>61</sup>.

Assuming that the patient was a freeborn person, the provisions of the *lex Aquilia* were not applicable<sup>62</sup>. Since medical interventions typically did not cause a deliberate injury to the body<sup>63</sup> or a mental disorder<sup>64</sup>, an action for injury was also not an option<sup>65</sup>. From damage to property the Aquilian action was later on extended through Byzantine interpolations also to the negligent injury of *ingenui*<sup>66</sup>, however, negligent killing of a free person was not prosecuted in the ordinary legal proceeding, but the patient was entitled to a praetorian action, based on the *lex Aquilia* («Liber homo suo nomine utilem Aquiliae habet actionem: directam enim non habet», Ulpianus in D. 9, 2, 13pr). Moreover, various faults of this nature were treated separately; for instance, the careless prescription of toxic substances was regulated by the Cornelian Law on Assassins and Poisoners<sup>67</sup>, death through neglect of a doctor created

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(1971), pp. 97-98 and 160. Cf. also KUNKEL (1925), pp. 329 ss.; KUNKEL (1929), pp. 161-162; BELOW (1953), p. 116; HAUSMANINGER (1996), pp. 16 and 37-38; ZIMMERMANN (1996), p. 979.

60 The compilers, both of *Collatio* and *Digesta*, apparently had the same Ulpian's version of the text available, revised and distorted by the post classics. For the attempt of reconstruction of the original text see VON LÜBTOW (1971), p. 161.

61 A direct legal remedy was also granted in *Inst.* 4,3,6 for the same situation when a negligent physician who had operated upon a slave disregarded his treatment, so that the slave died as a consequence.

62 Based on *Ulp.* D. 9,2,13 pr, the Glossators extended the *lex Aquilia* to the cases of physical injury inflicted upon *ingenui*. Cf. HELDRICH (1940), p. 157, nt. 2; BELOW (1953), p. 118; ZIMMERMANN (1990), p. 74; ZIMMERMANN (1996), pp. 1015 and 1024; RIEGGER (2007), p. 45.

63 *Cic. De inv.* 2,20, *Gai.* 3,225, *Coll.* 2,2,1; *Ulp.* D. 47,10,7,2

64 *Ulp.* D. 47,10,15 pr

65 MOMMSEN (1899), pp. 790 and 836.

66 Cf. *Ulp.* D. 9,2,13 pr; MOMMSEN (1899), p. 836; MEYER (1907), p. 43; HELDRICH (1940), p. 158; LÜBTOW, VON (1971), p. 214.

67 *Marc. D.* 48,8,3; *Paul. Sent.* 5,23,19. The penalty of this law is imposed upon any one who produces, buys, sells or owns poison for the purpose of homicide, while the term 'poison' specifically mentions and includes substances that can be used for curing diseases. Fragment D. 48,8,3,2 also explicitly gives an example of a woman who accidentally, with-

the duty of the heir to *defensio mortis*<sup>68</sup>.

Provided that the doctor's liability for malpractice was determined, the patient may have demanded the compensation of material damage, especially the medical expenses and the loss of earnings<sup>69</sup>. Requests for compensation of immaterial damage, such as physical pain or mental anguish, were not approved<sup>70</sup>. Due to the general acceptance of the principle that the body of a free person is inestimable (*liberum corpus aestimationem non recipiat*)<sup>71</sup>, compensation for scarring and disfigurement was explicitly denied<sup>72</sup>.

By looking at the liability of physicians in general, we can observe a peculiarity, namely in the domain of private law, where the negligent treatment of a slave had far more serious consequences for the doctor than the culpable violation of a free person's health. Damages to property enjoyed considerable protection compared to personal injuries, which were not protected by equally effective legal remedies. Apart from that, by making the liability dependent on fault and furthermore introducing flexible determination of compensation, tailored to the individual case, specific conditions for medical liability were created, ones that could equally serve the interests of both physicians and patients. Consequently, our reconstruction of the legal framework and liability of the Roman *medicus* confirms the existence of principles that transcend time and place and even today represent a relevant subject in an ongoing debate within modern medical law.

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out intent, gave a cure for infertility with fatal consequences. As a sanction, for persons of inferior rank it was customary to be thrown to wild beasts, and for those of higher social status a deportation to an island and the confiscation of all property (D. 48,8,3,5). See MOMMSEN (1899), p. 839; BELOW (1953), pp. 126-128; WACKE (1979), pp. 531-534; MEMMER (2006), pp. 204-205.

68 Ulp. D. 29,5,5,3

69 Gai. D. 9,1,3; Ulp. D. 9,2,7 pr; Gai. D. 9,3,7; Paul. D. 13,6,22; Pomp. D. 13,7,8 pr; Ulp. D. 17,2,52,4; Pomp. D. 17,2,60,1; Ulp. D. 17,2,61; Ulp. D. 19,1,13,22; Inst. 4,5,1. In case the lawsuit was initiated with *actio locati*, due to the *ex bona fide clause* the formula was elastic enough to meet all the requirements for indemnification of the damage. If the patient brought the case for damages with *actio legis Aquiliae*, the Aquilian law considered, in fact, only the objective criteria, but the classical jurisprudence extended the scope of the claim under the aspect of *id quod interest*. Eventually, an *actio in factum* and *extraordinaria cognitio* allowed the judge to decide with absolute discretion *causa cognita*. See BELOW (1953), pp. 120-121 with instructions on further literature; again BELOW (1964).

70 Gai. D. 9,1,3; Ulp. D. 9,3,1,5; Gai. D. 9,3,7

71 Gai. D. 9,1,3; Gai. D. 9,3,7

72 Cf. HELDRICH (1940), p. 156; ZIMMERMANN (1996), p. 1026.



## 5. Conclusion

The purpose of this contribution was to challenge the quoted statements found in literary sources and to investigate whether doctors deserved the bad reputation that they were associated with. Since the Roman population was culturally too underdeveloped to be able to compete with the advanced Greeks in the field of medicine, their attitudes are understandable because they only reflect the fear and skepticism of the unknown. The non-national character of the profession that was dominated by *peregrini* (but, contrary to popular belief, not only by Greeks), its social position given that it was operated by slaves and freedman, as well as the inexistence of a specific medical class, certainly had an enormous effect on the perception and the status of the medical art. Cato, a principal source of mistrust towards Greeks, whom he used as scapegoats, provided his blanket statements of doctors' incompetence and charges of murder probably with a political and ideological background. Besides conscientious, educated medicals and capable surgeons, simultaneously there must have existed unscrupulous doctors, as well as opportunists. In the course of time, the reputation and, consequently, the legal status of the medical profession grew, partly because of the higher cultural standard and partly due to the privileges the emperors granted to doctors.

The restrained attitude towards doctors, accusations for misuse of power, endangering patients and incompetent practice that the literary sources testify are rooted to a large extent in the human relationship between the doctor and the patient and the specific requirements towards the profession to comply with the ethical standards. Precisely, what Pliny demonstrated in a variety of ways is the fear of a regular layman that the doctor could use his position of authority and trust to abuse the patient. This only proves that the Romans naturally acknowledged that a physician and a patient were far more than typical contractual parties and that their bond, which presupposes trust, was far more than a bare legal contract. A certain skepticism towards doctors was also justified because of a specific feature of Roman private law, according to which property was far better protected in case of damage than a free person's health in case of negligent medical injury. The only legal ruling which implied that an *ingenuus* could claim for malpractice out of delict (*Ulp. D. 9,2,13pr*) is commonly suspected to be interpolated.

Heldrich's statement that «compared to today's medicine antiquity is only a beginning; the Roman law, however, is in many aspects already the

end»<sup>73</sup> illustrates very well the different degrees of development of the two disciplines in the same society and timeframe. Concerning medicine, Roman society was moving very slowly towards recognition of professional value of the medical practitioner in a long and torturous process. On the other hand, when we consider Roman private law, a multitude of individual cases discussed by the Roman jurists and the fact that they have been included in the Digest clearly indicate a practical significance of medical liability. Certainly, Roman law did not know a consistent civilian liability of modern codifications; nevertheless, it was able to meet many requirements as a rudimentary forerunner for medical liability.

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73 HELDRICH (1940), p. 158.

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## MILITARY LAW, JUSTICE AND DISCIPLINE IN THE EARLY MODERN OWLGLASS LITERATURE FROM CENTRAL EUROPE\*

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The radical growth in number of armed forces and the scale of warfare in the early modern Europe led to more frequent contacts between civilian population (especially from lower social strata) with professional soldiers. The problems with regular pay, adequate supply, and deficiency in command and control system were the main causes of combatants' ravages and other misconducts against civilians. State apparatus and military commanders had attempted to improve the condition of military discipline, e.g. through issuing special military codes (so called articles of war)<sup>1</sup> and establishing distinct military judiciary (courts-martial), but their efforts ordinarily remained ineffective. How the lower classes of society perceived this tension between theory and practice in the conduct of troops? One of the useful sources for this question is the genre of early modern plebeian literature known as Owlglass literature.

Owlglass literature is the kind of literary genre referring to German Eulenspiegel, the kind of parody of moralistic parables, very widespread in the medieval Europe<sup>2</sup>. According to outstanding Polish historian, Stanisław Grzeszczuk, this kind of literature: «Prowokacyjnie ośmiesza mity i ideały kultury 'oficjalnej', zarówno szlacheckiej i kościelnej, jak też mieszczańskiej, parodiuje pojęcia etyczne i estetyczne, drwi z poetyki i ideologii, złośliwie deprecjonuje świat wartości społecznych, politycznych, moralnych i oby-

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1 The most important Polish-Lithuanian articles of war were approved by the Polish-Lithuanian *Sejm* (Grand Diet) in 1609: *Artykuły wojenne hetmańskie autoritate sejmii aprobowane*, Warsaw, 26<sup>th</sup> February 1609, in KUTRZĘBA (1937), pp. 169-209. One of the most influential articles of war, which were in force during the Thirty Years War in Germany, were the famous Gustavus Adolphus' articles of war issued in 1621 (English translation as *The Swedish Discipline*, London 1632); COOPER (1981), pp. 129-137.

2 GRZESZCZUK, *Wstęp*, in GRZESZCZUK (1985), pp. iii and v.

czajowych w tej kulturze uznawanych i cenionych»<sup>3</sup> [Provocatively satirizes myths and ideals of noble and ecclesiastical, as well as bourgeois 'official' culture, parody ethic and aesthetics notions, jeers at poetics and ideologies, virulently depreciates the world of social, political, moral and customary values preferred and highly estimated in this culture]. Knightly ideals were often ridiculed by anonymous writers, often hiding behind satirical pseudonyms<sup>4</sup>.

The theme of military discipline appeared chiefly in cycle of dramas devoted to fictitious clerical servant and scribe, called Albertus, published in 1590's, who was sent for war by his master, catholic parson: *Wyprawa plebańska* [Priests' expedition]<sup>5</sup> from 1590 and *Albertus z wojny* [Albertus -returns-from war]<sup>6</sup>, which see the daylight six years later. Both of them were rewritten about twenty years later and renamed as *Walna wyprawa do Wołoch ministrów na wojnę z 1617 r.* [The General War Expedition of -Protestant- Ministers to Vallachia in 1617] and *Zwrócenia Matyasza z Podola* [The Return of Matyasz from Podolia]<sup>7</sup>. The Roman Catholic priest was replaced there by protestant clergyman. *Synod klechów podgórskich dla nieustawiczności porządku między nimi w Krakowie złożony i uczyniony roku 1607, 10 Januarii* [The Synod of Podgórze Priests concerning the Turmoil among Them in Kraków, 10<sup>th</sup> January 1607]<sup>8</sup>, *Komedia rybaltowska nowa z 1615 r.* [The New Minstrel Comedy]<sup>9</sup>, *Genealogia Nisidesa z Gratisem abo wywod liniey z ktorey zacność swoją y własności sobie przytomne pokazują a nakoniec nowiniarz z Hochabesem tę rzecz konkluduią z 1635 r.* [Genealogy of Nisides and Gratis, or The Lineage in which they shows their worthiness and their characteristics concluded by the Faddist and Hochabes in 1635]<sup>10</sup> and *Krotofile ucieszczne y żarty rozmaite* [Happy Drolleries and Various Jokes] by Adam Władysławiusz<sup>11</sup> should be noted as well.

3 *Ibidem*, pp. vi–vii.

4 *Ibidem*, pp. li–liv.

5 *Wyprawa plebańska*, in GRZESZCZUK (1985), pp. 4–40.

6 *Albertus z wojny*, in GRZESZCZUK (1985), pp. 41–90.

7 *Walna wyprawa do Wołoch; Zwrócenie Matyasza*.

8 *Synod klechów podgórskich dla nieustawiczności porządku między nimi w Krakowie złożony i uczyniony roku 1607, 10 Januarii*, in GRZESZCZUK (1985), pp. 369–399.

9 *Komedia rybaltowska nowa*, in GRZESZCZUK (1985), pp. 91–122.

10 *Genealogia Nisidesa z Gratisem abo wywod liniey z ktorey zacność swoją y własności sobie przytomne pokazują a nakoniec nowiniarz z Hochabesem tę rzecz konkluduią*, in BADECKI (1950), pp. 243–255.

11 WŁADYSŁAWIUSZ (1948), p. 3.



We decide to juxtapose the vision of military discipline and judiciary embodied in Polish-language literary works with the 'bestseller' of the 17<sup>th</sup> century picaresque literature (also referring to the Owlglass tradition), *Der abentheuerliche Simplicissimus* [The adventurous Simplicissimus] by Hans Jakob Christoffel von Grimmelshausen, published in Nuremberg in 1668. Text of the novel based on the writer's personal experiences from the period of the Thirty Years War. Importantly, the story of Simplicissimus combines the perspective of the civilians harmed by soldiers with the perspective of the soldiers themselves (Grimmelshausen as a child supposedly accompanied the Imperial army, and after he had come of age, he became a regular soldier, and raised to the office of regiment clerk)<sup>12</sup>. Thus, the author not only wrote at length about the atrocities committed by the troopers but also tried to present their point of view<sup>13</sup>.

There is no doubt, that anonymous artists did not nourish any warm feelings toward soldiers, contrarily they were clearly afraid of them. The presence of troops usually announced serious problem for inhabitants of Polish and Lithuanian villages and cities. Soldiers pillaged without any scruples poor and rich, noblemen and priests as well as peasants<sup>14</sup>. Money, gold, silver or iron stuff disappeared from manors and peasant houses together with spice, grain, poultry, cattle, horses, oat and hay, taken by armed robbers. Even fishes in the pond were taken<sup>15</sup>. Gold and silver objects and liturgic vestments were stolen from the church<sup>16</sup>. Women were assaulted<sup>17</sup>, some peasants were cudgelled. The attempts of self-defence or even making remonstrations often could terminate sadly for protesters, because they would have been badly beaten by their oppressors<sup>18</sup>. Even in the case of buying food there was a problem with fraud and extortion<sup>19</sup>. Most soldiers were seen as godless creatures,

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12 Biographic entry: WEYDT (1966), pp. 89-92; also WILSON (2009), pp. 818-820, HABERKAMM (1998), pp. 365-400.

13 MORTIMER (2002), p. 164.

14 *Albertus z wojny*, p. 60, vv. 320-325.

15 *Komedia rybałtowska nowa*, pp. 95-97, vv. 35-52; 60-64; *Zwrócenie Matyasza z Podola*, p. 11, vv. 217-230; *Genealogia Nisidesa z Gratisem*, pp. 250, vv. 178-189.

16 *Albertus z wojny*, pp. 70-71, vv. 492-520.

17 *Komedia rybałtowska nowa*, p. 105, vv. 195-196; *Zwrócenie Matyasza z Podola*, p. 11, vv. 227-228.

18 *Albertus z wojny*, p. 60, vv. 320-341, though sometimes peasants had a chance for revenge and beat soldiers painfully, *Zwrócenie Matyasza z Podola*, p. 6, vv. 62-66.

19 *Synod klechów podgórskich*, p. 388, vv. 488-499; WŁADYSŁAWIUSZ (1948), p. 26, vv. 13-20.

having in deep disregard all religious commandments and looking only for their own pleasure. They even stole from churches where they took not only gold and silver vessels but even liturgical vestments<sup>20</sup>. Sometimes they were also described as heavy drunkards and card or dice players, having military codes and discipline in heavy disregard<sup>21</sup>. Infantry soldiers and mercenary of Hungarian origin were described as the worst offenders<sup>22</sup>.

Also, Grimmshausen devote a lot of space to the cruelties and robberies committed by the undisciplined soldiers. The particular fame was gained by the description of the assault by the demoralised cavalry troop on the main character's farm, in which author so to say introduces the audience into the gruesome reality of the Thirty Years War: «Das erste, das diese Reuter thäten, war, daß sie ihre Pferd einstellten, hernach hatte jeglicher seine sonderbare Arbeit zu verzichten, deren jede lauter Untergang und Verderben anzeigte, dann ob zwar etliche anfiengen zu metzgen, zu sieden und zu braten, daß es sahe, als solte ein lustig Panquet gehalten werden, so waren hingegen andere, die durch-stürmten das Hauß unden und oben, ja das heimlich Gemach war nicht sicher, gleichsam ob wäre das gülden Fell von Colchis darinnen verborgen. (...) Was sie aber nicht mit zu nehmen gedachten, wurde zerschlagen. (...) Unser Magd ward im Stall dermassen tractirt, daß sie nicht mehr darauß gehen konnte, welches zwar eine Schand ist zu melden! Den Knecht legten sie gebunden auff die Erd, stecketen ihm ein Sperzholtz ins Maul, und schütteten ihm einen Melckkübel voll garstig Mistlachen-wasser in Leib, das nenneten sie ein Schwedischen Trunck, wordurch sie ihn zwungen, eine Parthey anderwärts zu führen, allda sie Menschen und Viehe hinweg namen, und in unsern Hof brachten. (...) Da fieng man erst an, die Stein von den Pistolen, und hingegen an deren statt der Bauren Daumen aufzuschrauben, und die arme Schelmen so zupoltern, als wann man hätt Hexen brennen wollen, massen sie auch einen von den gefangenen Bauren bereits in Bachofen steckten, und mit Feuer hinder ihm her warn, ohnangefehen er noch nichts bekennt hatte; einem andern machten sie ein Sail umb den Kopff, und raittelten es mit einem Bengel zusammen, daß ihm das Blut zu Mund, Nas und Ohren herauß sprang. In Summa, es hatte jeder sein eigene invention, die Bauren

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<sup>20</sup> *Albertus z wojny*, pp. 70-71, vv. 492-520.

<sup>21</sup> *Albertus z wojny*, p. 72, vv. 523-543.

<sup>22</sup> DZWONOWSKI (1985), p. 301, vv. 25-30; *Wyprawa plebańska*, p. 38, vv. 485-488; *Zwrócenie Matyasza z Podola*, pp. 11-12, vv. 245-254; WŁADYSŁAWIUSZ (1948), p. 26, vv. 13-20; *Albertus z wojny*, pp. 71-71, vv. 492-520.

zu peinigen, und also auch jeder Bauer seine sonderbare Marter» [The first thing that these troopers did was to stable their horses. After that each had his special task to perform, and each task augured nothing but death and destruction; for while some of them began to slaughter the animals and to boil and bake their flesh, so that it looked as if a merry banquet were going to be held there, there were others who stormed through the house, upstairs and down; indeed, not even the privy was spared, for they searched it as if the Golden Fleece of Colchis were concealed in it. (...) and what they did not mean to take along was smashed to pieces. (...) Our maid was man handled in the stable in such wise that she could scarce stand up and walk out of it, which is certainly a shame to report! The hired man they tied up and laid on the ground, thrust a piece of wood into his mouth to hold his jaws open, and poured a milk-pail full of vile liquid manure down his throat; this they called a 'Swedish punch', and with it they compelled him to lead a party of them to other places, where they took away people and animals and brought them to our farm (...). Then they set to unscrewing the flints from their pistols and to screwing in their place the peasants' thumbs, and to torturing the poor rascals, just as if they were witches headed for the stake; in fact, they had already thrust one peasant they had captured into a bake-oven and were after him with fire, despite the fact that he had not yet confessed to anything. Around the head of another one they put a rope and twisted it tight with a stick till the blood spewed from his mouth, nose, and ears. *In summa*, each had his own special way of torturing the peasants, and thus each peasant had his own particular torture]<sup>23</sup>. Many more such scenes can be found in the novel, although according to the findings of the historians analogous situations were not as common, as were earlier supposed. Grimmelshausen's work is even accused of being instrumental to the rising of a 'myth of the all-destructive fury of the Thirty Years War'<sup>24</sup>.

It was maintained, that the army created possibility of social climbing, based on fraud and extortion. Many peasants and servants, living in places close army marching routes, joined to cavalry or infantry troops after making thefts against their former employers. The soldiers' servant quickly make themselves very similar to their new masters, wearing akin clothes and cultivating the same habits. Thanks to noble appearance and soldier's

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23 *Der abentheurliche Simplicissimus*, pp. 18-20 and *Simplicissimus, The German Adventurer*, pp. 23-25.

24 BENECKE (1972), pp. 245-246; MORTIMER (2002), pp.1-2; HANLON (2012), p. 3.

status even the poorest ex-peasants easily could be regarded as noblemen, terrorizing and stealing not only other villagers, but their masters as well<sup>25</sup>. It was also seen, that some soldiers presented their courage only against civilians, losing their stamina when they had to stand against Turks or Tatars. Such 'heroes' usually deserted the ranks in spite of heavy penalties envisaged against the offenders by Polish-Lithuanian law. Albertus can serve as an example of such behaviour, because he was running away, when the troops left their winter quarters and were going to summer camp to protect the borderland against infidels. He was only returning after the end of the campaign<sup>26</sup>.

In *Der abentheuerliche Simplicissimus* we can find the whole chapter dedicated to the prospects for career, which war offers to the plebeians in spite that Grimmelshausen clearly emphasized that nobility had privileged position in the army and could more easily obtain the highest and the most lucrative ranks<sup>27</sup>. Also, in the German novel the soldiers' main concern was not winning the next battle or campaign, but finding the wealthiest quarters<sup>28</sup>. The characters of the novel to a very small extent identified themselves with the cause for which fought their armies, so they very frequently changed sides, when it was profitable to them, i.e. Simplicissimus himself after the battle of Wittstock (1636) left the Imperial camp and defected to the victorious Swedish army<sup>29</sup>.

One of the most striking element of soldier's image was deep-rooted belief in his impunity directly connected with his victims powerlessness, which can be seen in almost all texts. Peasants called Wojtas, one of the characters of *Albertus z wojny*, told Albertus, that he was beaten while he was complaining to the officer commanding the troop, trying to regain his stolen horse. Other complaints, even made by the Parson, had a very similar effect. The commander simply dismissed all petitions and his subordinates jeered at the victims<sup>30</sup>. A very similar attitude appeared in other pieces, probably with only two exceptions. Firstly, anonymous author of *Genealogia Nisidesa z Gra-*

25 DZWONOWSKI (1985), pp. 303-304, vv. 63-67; *Zwrócenie Matyasza z Podola*, pp. 12-13, vv. 278-314.

26 *Albertus z wojny*, pp. 76-77, vv. 614-635; also *Genealogia Nisidesa z Gratisem*, p. 250, v. 178-189.

27 *Der Abentheurliche Simplicissimus*, pp.18-20.

28 *Ibidem*, p. 443.

29 *Ibidem*, pp. 234-235.

30 *Albertus z wojny*, p. 60; vv. 320-341.

*tisem*, ordered the character named Nowiniarz to maintain, that the reward for all robberies and rapes would be death penalty by hanging or decapitation, so pillaging would not be a safe kind of enriching. Secondly, the Parson in *Albertus z wojny* warned his former servant, while he was finding him during stealing a couple of hens, that such activity was usually punished by death and was allowed only abroad<sup>31</sup>. These voices were isolated, the rest of the authors were at best sceptical about judicial effectiveness, more often left its activities out without any comment. Moreover this view was widely shared also by specialist judicial literature, i.e. Jakub Zawisza in his *Wskrócenie prawnego procesu kornnego* by 1613 wrote: «W wojsku, między żołnierzami na żołnierza sprawiedliwości dochodzić wielka trudność i niepodobna, by miał najsprawiedliwszą, aby ją mógł i dobrze wywieść, i właśnie otrzymać, bo łatwiej do fałszu o sto brodatych i jakoby pocziwych świadków niż o jednego do prawdy contra fortunam armati, gdzie wszyscy przed sądem słowy i zgrzytaniem zębów przegrazają»<sup>32</sup> [In the army, among soldiers it is very difficult and nearly impossible to bring them to justice, even if somebody's cause is the most rightful, because it is easier to find a hundred bearded and ostensibly righteous witnesses who testify the false, than one who testify the truth *contra fortunam armati* in the court where all people threaten him with words and with grinding their teeth].

In matters of soldiers' impunity can be observed the most striking differences between literary pieces from the territory of the Polish-Lithuanian Commonwealth and the novel published in Nuremberg. In Grimmelshausen's work among numerous descriptions of soldiers' crimes we will find also almost so many examples of very severe enforcement of military discipline. *Simplicissimus* perfectly realized that trespassing the rules of military discipline was sanctioned with very probable, if not imminent, penalties. In a few cases only happy coincidence saved the main character from scaffold or death squad (e.g. aforementioned defeat of Catholic forces in the battle of Wittstock)<sup>33</sup>. On the pages of the novel we can also find characters of NCOs known from their harshness towards subordinates. The functioning of military judiciary was presented (e.g. spacious description of the questioning

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31 *Genealogia Nisidesa z Gratisem*, p. 249, vv. 146-163; *Albertus z wojny*, pp. 62-63, vv. 360-364, 376-383.

32 Zawisza, *Wskrócenie prawnego procesu koronnego*, p. 39.

33 *Der abentheurliche Simplicissimus*, pp. 231-235.

of the defendant)<sup>34</sup>. In the field of military discipline the officers were not only the ones who controlled it's observance, but in turn were themselves controlled by state authorities, Grimmelshausen described the inspection of Swedish War Council commissaries in the garrison of Hanau and fear, which it aroused among Swedish commanders<sup>35</sup>. We must remember that primarily the crimes against the army's cohesion and combat prowess were punished (i.e. duels)<sup>36</sup>, much less attention was paid to the transgressions against civilian population. The maintaining the army as an effective tool of waging war was the main priority of military and state administration. The protection of civilians were put aside.

The peasants, made desperate because of pillagers' actions, were more dangerous and able to defy against individual robber or smaller bands. In *Zwrócenie Matyasza z Podola* the eponymous hero was chased away from inn with a staff by an alewife when she found out that he was a soldier<sup>37</sup>. This kind of experience also felled to Konfederat's lot. He was a character from *Komedia rybaltowska* and was taken into captivity by peasant and a group of low-ranking clergymen. He almost lost his life, but it should be added, that in the case of stronger troops all defiance was regarded as futile<sup>38</sup>.

Analogous experiences from the Thirty Years War were presented in *Der Abentheuerliche Simplicissimus* – the peasants from time to time could defeat the smaller groups of soldiers, but in this way they very often took the risk of pitiless revenge by the comrades of the defeated troopers<sup>39</sup>.

Soldiers usually had maintained, like Albertus in *Albertus z wojny*, that they had the right to take all necessary food and forage. Such belief was strongly contested by Parson, who rightly, but without any success, invoked the statutes passed by Polish Sejm in 1591 and 1593, which ordered soldiers to pay for their food and beverages<sup>40</sup>. In the view of military mutineers from the second decade of next century they could be sued only to Sejm court, what was nearly equal to impunity<sup>41</sup>. It is noteworthy, that some authors regarded a soldier as a kind of victim too. He had got his promised pay rarely and with

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34 *Ibidem*, pp. 226-230.

35 *Ibidem*, pp. 132-136.

36 *Ibidem*, p. 467.

37 *Zwrócenie Matyasza z Podola*, p. 8, vv. 113-130.

38 *Komedia rybaltowska nowa*, pp. 110-112, vv. 295-316.

39 *Der abentheuerliche Simplicissimus*, pp. 179-180.

40 *Albertus z wojny*, p. 69, vv. 470-475.

41 *Komedia rybaltowska nowa*, pp. 102-103, vv. 131-160.

long delay, at the same time losing their substance, health and, very often, life in the His Majesty and Commonwealth service. Since he felt aggrieved himself, he returned all his injuries with interest to civilians, robbing royal, church and noble estates under the guise of legal food supply<sup>42</sup>.

Likewise, Grimmelshausen seen in soldiers not only the perpetrators of crimes, but also the victims of war. Thus, originating from Palatinate writer summarized the soldiers' fate: «Dem Fressen und Sauffen, Hunger und Durst leiden, huren und buben, raßlen und spielen, schlemmen und demmen, morden, und wieder ermordet werden, todt schlagen, und wieder zu todt geschlagen werden, tribulirn, und wieder getrillt werden, jagen, und wieder gejaget werden, ängstigen, und wieder geängstiget werden, rauben, und wieder beraubt werden, plündern, und wieder geplündert werden, sich fürchten, und wieder gefürchtet werden, Jammer anstellen, und wieder jämmerlich leiden, schlagen, und wieder geschlagen werden; und in Summa nur verderben und beschädigen, und hingegen wieder verderbt und beschädigt werden, war ihr gantztes Thun und Wesen. Woran sie sich weder Winter noch Sommer, weder Schnee noch Eiß, weder Hitz noch Kält, weder Regen noch Wind, weder Berg noch Thal, weder Felder noch Morast, weder Gräben, Päß, Meer, Mauren, Wasser, Feuer, noch Wälle, weder Vatter noch Mutter, Brüder und Schwestern, weder Gefahr ihrer eigenen Leiber, Seelen und Gewissen, ja weder Verlust deß Lebens, noch deß Himmels, oder sonst einig anderer Ding, wie das Nahmen haben mag, verhindern liessen. Sondern sie webereten in ihren Wercken immer embsig fort, biß sie endlich nach und nach in Schlachten, Belägerungen, Stürmen, Feld-Zügen, und in den Quartieren selbst, (so doch der Soldaten irdische Paradeis sind, sonderlich wenn sie fette Bauren antreffen) umbkamen, starben, verdarben und crepirten; biß auff etlich wenige, die in ihrem Alter, wann sie nicht wacker geschunden und gestolen hatten, die allerbeste Bettler und Landstürtzer abgaben» [For glutting themselves with food and drink, suffering hunger and thirst, roaring and whoring, gambling and rambling, carousing and sousing, murdering others and being murdered in turn, beating others to death and being beaten to death in turn, tormenting others and being tormented in turn, hunting others and being hunted in turn, frightening others and being frightened in turn, robbing others and being robbed in turn, plundering others and being plundered in turn, fearing others and making others fearful in turn, causing

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42 *Ibidem*, p. 115, v. 359-368; *Walna wyprawa do Wołoch*, p. 31, vv. 401-424; *Zwrócenie Matyasza z Podola*, pp. 11-13, v. 245-254, 256-314.



others misery and suffering miserably in turn, defeating others and being defeated in turn, and, *in summa*, ruining and harming others and being ruined and harmed in turn was all they did and were, in which deeds they let hinder them neither winter nor summer, neither snow nor ice, neither heat nor cold, neither rain nor wind, neither hill nor dale, neither field nor morass, neither ditches, passes, seas, walls, fire, water, nor battlements, neither father nor mother, brothers nor sisters, neither danger to their own bodies, souls, and consciences, indeed, neither loss of life or of salvation or of anything else one can name. Instead, they kept right on plying their trade, till little by little they finally perished, died, went to their graves, and gave up the ghost in battles, sieges, assaults, campaigns, and even in garrison (which is, after all, heaven on earth for a soldier, particularly when he happens upon fat peasants), except for some few who, having failed to diligently flay peasants and steal them blind, turned out to be the very finest beggars and runagates]<sup>43</sup>.

Central European Owlglass literature left its readers hardly any illusions about the state of military discipline, soldiers' behaviours towards civilians, or efficiency of precautions taken by military authorities. Undisciplined *sol-datesca* was perceived as a plague of nearly biblical dimension, which haunted seventeenth-century society like hunger or natural disasters. There was no way to effectively stand up against it. The most important difference between German novel and Polish-Lithuanian works concerns perceiving of soldiers' impunity. Literature from the Polish-Lithuanian Commonwealth territories pointed out such impunity among soldiers, whereas *Simplicissimus* visibly felt some respect towards military judiciary (at least to some extent). It could be an effect of not only real differences between the level of military discipline in the Polish-Lithuanian armies and the armies fighting in the territory of the Reich during the Thirty Years War, but also of the authors' different perspectives. Hans Jakob Christoffel von Grimmelshausen had considerable military experience, while the authors of the Polish-language works were probably civilians.

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43 *Der abentheurliche Simplicissimus*, pp. 54-55 and *Simplicissimus, The German Adventurer*, pp. 70-72.



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PAMPHLET LITERATURE REFLECTING PARLIAMENTARY  
OPPOSITION AT THE TIME OF THE FRENCH FRONDE:  
THE EXAMPLE OF THE *MAZARINADES* (1648-1649)\*

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Cardinal of Retz's *Mémoires* referring to the behavior of the Parliament of Paris during the Fronde can sum up some of the paradoxes of the movement itself: «Bachaumont (a magistrate of the Paris Parliament) pondered to say, jokingly, that the Parliament did as schoolboys that revolt at Paris trenches, but that splits when they see the civil lieutenant, waiting to gather again when he's gone»<sup>1</sup>. This opinion may be applied also to the pamphlet literature that arose in those times. Indeed, this literature, called *Mazarinades*<sup>2</sup>, was far from being coherent or going in only one direction as a unity. In fact, the only common basis that we found in *Mazarinades*, from a political perspective, was the references to pamphlets expressing opposition or support to the Cardinal Mazarin<sup>3</sup>.

This precision made, it is clear that at least for the time assessed in this research – called by the historiography the *fronde parlementaire*<sup>4</sup> – political and institutional opposition to measures taken by the Regency was represented by the Paris Parliament and the Parisian Sovereign Courts *grosso modo*<sup>5</sup>. Two examples are enough to illustrate this point: the *Arrêt d'Union* in May 1648, in which the four Parisian Sovereign Courts decided to reunite an assembly of some of their magistrates to discuss 'public affairs'<sup>6</sup>; and the

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\* Unless otherwise indicated translations from French are my own. For the poems used in this intervention, I put the French original versions in footnotes.

1 CARDINAL DE RETZ (1837), p. 161.

2 Concerning the identification of the texts, unless otherwise indicated, we will use mostly the references given by MOREAU (1851), vol. 3.

3 Two authors' general works about *Mazarinades* are retained: CARRIER (1989), CARRIER (1991), CARRIER (2004) and JOUHAUD (2009).

4 See among others: DOOLIN (1935); KOSSMANN (1954); LORRIS (1961); METHIVIER (1984); PORCHNEV (1972); RANUM (1995); DUCHÊNE, RONZEAUD (1989).

5 As said by the historian Lloyd Moote, it was a 'revolt of the judges': MOOTE (1971).

6 For some sources about this event: Archives Nationales (AN), series U-182, fol. 256-258; LE BOINDRE (1997), pp. 140-141; MOLÉ (1856), vol. 3, p. 230. There is plenty of bibliog-

assembly of the Saint-Louis Chamber and the propositions made in the summer of 1648, which searched a constitutional reformation of the monarchy<sup>7</sup>. Among these propositions, we can find some classical parliamentary pretensions such as immovability of the officers (especially justice officers) and the elimination of justice and financial commissions (that were often used at the time of Richelieu and Louis XIII)<sup>8</sup>. In addition, we can find some more ‘revolutionary’ measures such as the obligation for the regency to pass every normative act through the ‘verification’ of the Sovereign Courts<sup>9</sup>, otherwise the act would be considered as non-existent; and one article containing an habeas corpus for all the King’s subjects.

Between the summer and fall of 1648, institutional conflict can be limited to the claims that Sovereign Courts were negotiating with Anne of Austria’s Regency. The declaration of the Regency in October 1648<sup>10</sup>, in which the Regency accepted all the propositions done by the Sovereign Courts in the summer (except the one containing the habeas corpus), was the tour de force of the first moment of the parliamentary Fronde. At the same time, pamphlet literature started to appear, especially those pamphlets echoing Parliamentarian’s thesis. In that quite formal sense, *Mazarinades* of that time of the conflict are more or less coherent.

This research assesses the time between the assembly of the Sovereign Courts (May 1648) and the times after the Reuil’s peace (spring 1649). The purpose is to study how pamphlet literature related to magistracy doctrine participates in a political and legal conflict that was generated in the top institutions of the monarchy. Furthermore, we analyze the influence of the political literature, as a rhetorical or practical tool, in the ‘public opinion’. Using some examples of this literature, two arguments will be stressed:

1. The *Mazarinades* echoed a legal argument used by the Sovereign Courts: the respect of legal procedures as a guarantee of justice;
2. Following the last argument, but in a bolder manner than the magistrates, *Mazarinades* proposed the institutional intervention of the Paris Par-

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raphy related to this *Arrêt*. We will stay with the ‘classic’ analysis of OLIVIER-MARTIN (1988), pp. 286-287: he considers the actions of the Parlement as an ‘open rebellion’.

7 See, among other sources containing the propositions: *Journal contenant tout ce qui s’est fait et passé en la Cour de Parlement de Paris, toutes les chambres Assemblées, sur le sujet du temps present*, Paris, 1648-1649, pp. 8-16.

8 BOONEY (1988); MOOTE (1962).

9 The debate about this issue is frequent since 1615. See KADLEC (2008).

10 *Journal contenant tout ce qui s’est fait*, p. 19.

liament (as well as the other Sovereign Courts in their matters) against arbitrary power exercised by the Regency.

### 1. *Seeking justice in the Mazarinades through legal issues*

The magistracy doctrine had always related the exercise of royal power with seeking justice. The medieval idea of a justiciary king – the king as a ‘fountain of justice’ – was precious to the magistracy, not only in its teleological aspect but also as a justification of his own prerogatives<sup>11</sup>. Seeking justice for the magistracy implied, *lato sensu*, the respect of pre-established procedures related to normative production and rules’ application. The former was related with the customary – and sometimes legal – procedure that included the participation of the Sovereign Courts by the means of verification and promulgation of the King’s ordinances. The latter referred to the respect of the procedures of justice established in the ordinances (mainly the big justice reformation ordinances of the 16<sup>th</sup> century). The two were *in fine*, for the magistracy, necessary to ensure sovereign’s Majesty<sup>12</sup>.

*Mazarinades* related to seeking justice can be divided into two groups. Those that, in an abstract or theoretical way, followed magistracy arguments; and those that accused of injustice a member of the Regency, mainly – obviously – Mazarin, to refer the same arguments of the magistracy. In the first group, we can find fewer pamphlets than in the second. Yet, they presented the ideas in a clearer fashion than the second group.

As an example of the first group, the pamphlet named *Le vray courtisan sans flaterie* of 1649<sup>13</sup>, recalled the theoretical basis of a legitimate monarchy as seen for the magistracy. In particular, those related to the normative production and the seeking of justice. First, it made the classic division between monarchy and tyranny with their respective characteristics. Then, the pamphlet accepted the royal origin of the authority of the Sovereign Courts. Yet, it considered – in a very subtle way – that Sovereign Courts had reacted in a legal way (that is, according to the customary procedure), and for the sake of justice:

«Of which crime will be guilty, those that with a discreet respect, and with considered

11 Here we follow KRYNEN (2009), pp. 79-103.

12 See HERNANDEZ VELEZ (2016).

13 MOREAU (1851), ref. 4067, titled *Le vray courtisan sans flaterie. Qui declare ce que c’est l’Autorité Royale*, Paris, chez la veufve d’Anthoine Coulon, 1649.

zeal for the welfare of the state, are opposed to these odious maxims and try [by the mean of remonstrances] to show that [it is unfair] to jail remarkable people, considered by their birth and for their beautiful qualities; and to deprive them of their goods without excuses and without reason? [...] It is up to you, dear lector, to accuse or to excuse them»<sup>14</sup>.

Another example, this time less theoretic, of a *Mazarinade* related to the seeking of popular justice is the *Requête des partisans présentée à Messieurs du parlement en vers burlesques* from 1649<sup>15</sup>, in which we can identify the people with no privileges: «We, whose money supports France»<sup>16</sup> refers to the ‘third’ order of the state, the *laboratores* of the feudal social order. This *Mazarinade* had the particular interest of showing both arguments taken from the magistracy doctrine and critics to the propositions of the Sovereign Courts. Some verses took the grievances and claims of the magistrates. They started with particular griefs of justice, such as the use of an incompetent judge:

«Our lords, this considered / Be pleased by your will / of receiving in this verses / the call from such an evidence / both of constant abuse / and incompetent judge / Of such a notorious incompetence / as we can recall»<sup>17</sup>.

And continued with the misuse of legal procedures, in particular those related to the gathering of evidence (which at the time was called *instruction*):

«And such a recording / Made hastily / Without regarding the pieces, in a hurry, / Without hearing or calling the parties, / having badly obtained the proofs»<sup>18</sup>.

However, this pamphlet also criticized the use of a new Court of Justice proposed by the Chamber of Saint-Louis in summer 1648 to judge financial matters<sup>19</sup>, saying that the said Court was only useful to those who were going to be paid by his establishment:

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<sup>14</sup> *Ibidem*, p. 14.

<sup>15</sup> In MOREAU (1051), ref. 3466, titled *Requête burlesque des partisans au Parlement*, Paris, Jacques Guillery, 1649. A digital version is available on Google Books.

<sup>16</sup> «Nous, dont l’argent soustient la France», *ibidem*, p. 6.

<sup>17</sup> «Nosseigneurs, ce considéré, / Il vous plaise de vostre gré / Nous recevoir par ses presentes / Appellans de telles patentes, / Tant comme d’abus bien constant / Qu’aussy de iuge incompetent. / Mais d’incompét assez notoire / Ainsi qu’en avons bon memoire», *ibidem*, p. 6.

<sup>18</sup> «Et de tel enregistrement, / Comme fait precipitement, / Sans piece veüe, à la volée, / Sans parties ouyes ou appellées, / Sur des deffauts mal obtenus», *ibidem*, p. 6.

<sup>19</sup> *Journal contenant tout ce qui s’est fait et passé*, p. 10.

«And we made a Chamber of justice / to eat a new «bread-money» (is a play on words) / And not for the subjects / Not useful to the Prince or to his subjects»<sup>20</sup>.

Finally, the *Requete des partisans* also considered the normative production as a part of the justice itself. Here the claim was also based on the magistracy doctrine:

«According to a multitude of edicts. / Fully wax sealed in many ways / but not strong enough. / Needing to make them endure / the seal from Parliament. / And from those sovereign pens / that render edicts certain / And without whose there is no safety / to make advance his Majesty»<sup>21</sup>.

On the second group, as said, we can find the pattern mostly used on this pamphlet literature: the accusation of Regency's agents. Already at the times of the *Arrêt d'Union* in May 1648, we can find a pamphlet – a sonnet – aiming Mazarin and opposing his political pretensions to the project of reformation discussed by the assembly of the Sovereign Courts on the Saint-Louis Chamber. It started with the words of Mazarin – «What is this arrêt of onion, or union (a play on words) / Which cause so much mayhem? / Say sad to his companion / The pantaloone (a play on words) with red cap» – and continues with the response made by two women – «This onion will make you cry / and you will not digest it [...] / This Italian, my tattler / only flays the French –»<sup>22</sup>.

Another example is the *Requete des trois Etats, présentée à Messieurs du Parlement contre le Cardinal Mazarin* of 1648. Based on Mazarin's foreign and humble origins, his supposed allegiance to the Spanish crown, and his

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20 «Et qu'on fit chambre de Iustice, / Pour manger nouveau pain d'Espice, / Et non point pour aucuns subjectz, / Utiles à Princes & subjectz», *Requete des partisans*, p. 7.

21 «En vertu de legions d'Editz, / Plains de Cire de mainte sorte, / Mais non pas pourtant assez forte, / Ayant pour durer longuement / Besoin du sceau du Parlement, / Et de ces plumes souveraines / Qui rendent patentes certaines / Et sans quoy n'y a seureté / D'avancer à sa Majesté», *ibidem*, p. 8.

22 Mazarin's words: «Qu'est-ce que cest Arrest d'oygnon, ou d'union / Qui nous cause tant de grabouge? / Dit tout triste à son compaignon / Le Pantalon au bonnet Rouge»; Women's words: «C'est [sic] oignon te fera pleurer, / Et ne pourras le digerer [...] / Cest Italien, ma commere, / Ne faict qu'écorchier le François». There is a digital version available in Google Books with the title *L'oygnon ou l'union, qui fait mal a Mazarin, avec quelques autres pieces du temps contre luy*. MOREAU (1851), ref. 2638. The verses are from the first page (page 3 in the document).

actions ('tricks, jokes and plots', to gain power), the pamphlet accused him of particular actions going against justice:

«Because him have disgraced, banned and imprisoned without reason nor legal forms, the Princes, Officers of the crown and the Parliament, great lords [...], and made die some of them by poison, among them the President [of the Parliament of Paris] Barillon»<sup>23</sup>.

This particular grief of the Parliament of Paris – the death of magistrate Barillon in prison some years before – was one of the main reasons for the Sovereign Courts to assembly themselves in search of protection<sup>24</sup>. Although the Parliament never accused directly Mazarin for the death of the said magistrate, it considered nevertheless that it was a policy that came from the Minister, and that could be repeated. Furthermore, the *Requete des trois Etats* echoed also the prerogatives of justice – the 'ordinary' jurisdiction – of the Sovereign Courts against the practice of commissions<sup>25</sup>, frequent since Richelieu:

«[Mazarin] has removed the charges without knowledge, to people who merited it, to give them to other, in order to make his 'creatures', he violated and reversed the justice, blocking us to demand some against those who are in his possession, stopping fair prosecutions against dreadful crimes, quashing and evading all the time Sovereign Court's arrêts, with évocations, or by the means of High Commissioner's arrêts»<sup>26</sup>.

The turning point in the style of the pamphlet literature related to the magistracy doctrine was the *arrêt* against Mazarin made by the Paris Parliament on 8<sup>th</sup> January of 1649. This decision condemned Mazarin to exile and named him 'enemy of the King and His State', turning the Parliament into a real institutional counter-power<sup>27</sup>. After this decision, pamphlets against Mazarin demanding 'real justice' were more violent.

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23 *Requete des trois Etats, présentée à Messieurs du Parlement contre le Cardinal Mazarin*, 1648, p. 4.

24 Throughout the Parliament assemblies (as well as the other Sovereign Courts) this issue can be found repeatedly. See for example for the Parliament: LE BOINDRE (1997), p. 101 and for the *Cour des Aides*: AN, séries U-2509, fol. 385 et 389.

25 RICHOU (1905).

26 *Requete des trois Etats, présentée à Messieurs du Parlement contre le Cardinal Mazarin*, pp. 4-5.

27 The sources and bibliography related to this *Arrêt* are numerous. Here, we follow the interpretation made by Saint-Bonnet, Sassier (2015), p. 349 and Pichot-Bravard (2011), pp. 211-212.



However, after the Reuil's peace with the Regency, we can notice some distrust to the judiciary role of the Paris Parliament in the *Discours sur la députation du Parlement à M. le prince de Condé*<sup>28</sup>. Although having a pessimistic vision of the posterity, this pamphlet accused again the Regency of some excess related to the justice administration:

«Three days after the publication of the [Reuil's] peace, an arrêt of the High Council évoque the appeals comme d'abus<sup>29</sup>, and quash a decision from the Parliament of Paris acknowledging the case. We have seen the sovereign commissions of the Hotel (de Ville) already reestablished [...] and yet the Parliament stays silent»<sup>30</sup>.

Related to this particular measure taken by the Regency, but in a more abstract way, this pamphlet exposed the threats underlying the real purposes of Mazarin. Among them, we can see the danger that would represent the suppression of the Parliament (which was a real threat to the author of the pamphlet). This suppression would leave the monarchy without a «rampart [to protect] public liberties», and would have as a consequence that «[the people] will claim, in vain, the authority of laws, [because] they will be too weak»<sup>31</sup>. Thus, the pamphlet implied that Sovereign Courts had an institutional role beyond exclusive administration of justice, as well as other pamphlets that will be exposed in the second part.

## 2. Seeking a good government in the Mazarinades through institutional issues

Historians mostly agree that it is in the first instance of the Fronde where we can find a political initiative of reform in the monarchical government<sup>32</sup>.

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28 MOREAU (1851), ref. 1147, titled *Discours sur la députation du parlement à M. le prince de Condé*, 1649. Moreau considers this pamphlet as one of the «most daring and insolent of the Fronde»: MOREAU (1850), vol. 1, p. 337.

29 The *appel comme d'abus* was intended to give the competence to the royal jurisdiction, mainly the Parliaments, of a case that was a privilege of the Church officials. The *évocation* was the prerogative of the King (or his Council) to take a case already started from a jurisdiction and move it to another.

30 *Ibidem*, p. 9.

31 *Ibidem*, p. 10.

32 From the XIX century onwards, a considerable part of the historiography have a constitutional (and even liberal) idea of the magistracy attempt. See for example COMTE DE SAINT-AULAIRE (1843) and DEBÛ-BRIDEL (1938).

In contrast with the second Fronde, or ‘nobiliary’ one, it is at the early times of the conflict that we can find some of the propositions made by the parties for a return of the ‘traditional monarchy’<sup>33</sup>. In regard to the *Mazarinades*, we can find the general lineaments of an institutional reformation at the time of the Parliamentary Fronde. Additionally, the main voice of the opposition to the regency from early 1648 were the Sovereign Courts, therefore the pamphlets related to reformations of the late Fronde (between 1650 and 1652) were likely a repetition of the first years.

The arguments used by the Sovereign Courts, and mainly by the magistrates of the Paris Parliament, had a popular allure. For instance, one of the justifications for all the measures proposed in the Chamber of Saint-Louis was the ‘relief of the people’<sup>34</sup>. Likewise, some main characters of the first Fronde were considered as the ‘fathers of the people’, in particular the magistrate of the Paris Parliament Pierre Broussel. He was the object of some praise in pamphlets at the times of the barricades at the end of August 1648<sup>35</sup>. Throughout Paris, the idea that the Parliament was a rampart to the excess of the regency (committed mostly by the Cardinal Mazarin) developed until becoming a sort of representation of public will against arbitrary power. This representation was reflected in some of the most revolutionary *Mazarinades* that proposed the institutional intervention of the Sovereign Courts to ensure good government.

Already at the time of the arrêt d’Union in May 1648, we can find a pamphlet hoping the reformation by the magistracy. The *Requete présentée aux quatre Compagnies Souveraines unies ensemble*<sup>36</sup> called the magistrates ‘arbitrators of our destiny’ in its first line. This poem, after expressing some usual grievances, used the argument of the co-government between the Sovereign Courts and the Regency. This argument had an important political

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33 This more conservative interpretation of the events of 1648-1649 can be found in MADELIN (1931) and CHERUEL (1879-1880).

34 The examples of the magistracy’s rhetoric can be found in the Saint-Germain-en-Laye conferences from 25<sup>th</sup> September to 4<sup>th</sup> October 1648. See *Suite du journal contenant tout c’est qui se fait*, pp. 5 and ss.

35 Two pamphlets praising the Magistrate Pierre Broussel are noticed by CARRIER (2004), p. 221-222: *Lettre à Monsieur de Broussel*, 1648 and *Le Vrai portrait du père du peuple et le grand support de la France*, 1649.

36 This poem can be found in the same Google Books file that the one quoted *supra*: *L’oygnon ou l’union, qui fait mal a Mazarin, avec quelques autres pieces du temps contre luy*, p. 6.

consequence because it implied that the magistracy could have a legislative initiative (already expressed ambiguously in the assemblies of the four Sovereign Courts). The *Requête* demanded to the Courts to:

«Render to our king although as a child / His kingdom happy and triumphant / And show to all in France / With the proper reforms / That your laws and your power / Are the surest founding principles»<sup>37</sup>.

One *Mazarinade* named *Le théologien politique, pièce curieuse sur les affaires du Temps pour la défense des bons François* of 1649<sup>38</sup>, echoed the sanctions against Mazarin made by the Parliament in January, 1649. This pamphlet used a sort of popular argument of resistance to the oppression made by the Cardinal and the Regency, because the Parliament was a «rampart against the tyranny of a foreign Minister»<sup>39</sup>. Moreover, it was said that the parliamentarians were, again, the ‘fathers of the people’, and the ‘protectors of the liberties, goods, and lives’ of the French people<sup>40</sup>. In addition, this pamphlet resumed some of the positions held by the doctrine of the magistracy related to the normative power (such as the auto-limitation of the king’s power and the possibility of disobedience against impious, unjust or inequitable measures), even if there were no real propositions concerning the relations between the two institutions.

On the contrary, the *Contract de mariage du Parlement avec la ville de Paris*, a pamphlet that appeared in January 1649 is one of the most interesting representations involving institutional consequences<sup>41</sup>. This use of the marriage metaphor (drawn by the *légistes* in the 16<sup>th</sup> in a similar way that the canonist Lucas de Penna did in the 14<sup>th</sup> century) had the utility of joining the King to his Kingdom as a unique entity, as the argument of the two King’s bodies did in England<sup>42</sup>. From a legal and political point of view, Robert De-

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37 «Rendez de mon Roy quoy qu’enfant, / Le Regne heureux & triomphant / Et monstrez à toute la France / Par des propices changements, / Que vos Loix & vostre puissance / En sont les plus seurs fondements», *ibidem*, p. 9.

38 Available on Google Books. MOREAU (1851), ref. 377, titled *Le Théologien politique: pièce curieuse sur les affaires du temps pour la défense des bons François*, Paris, Guillaume et Jean-Baptiste Loyson, 1649.

39 *Ibidem*, p. 4.

40 *Ibidem*, p. 5.

41 Available on Google Books. MOREAU (1851), ref. 783, titled *Le Contrat de mariage du parlement avec la ville de Paris*.

42 KANTOROWICZ (1957), pp. 218-223.

scimon considers that the *légistes* «advocated that it should not be the king who absorbs the state, but the state who absorbs the king»<sup>43</sup>. In consequence, it was a reinforcement of the idea of a transcendent public law, in particular what it was called the ‘fundamental laws of monarchy’. However, the metaphor of the marriage was not only used for the dignitas of the King and his Crown. We can find some application to other dignitates<sup>44</sup>, as in the case of the Paris Parliament in the *Contract de mariage du Parlement*.

Yet, this particular use of the metaphor of marriage had enormous institutional repercussions. If the King was – in the fashion of almost all the *légistes* of the time – married with the *res publica* as an organic body, to say that the Parliament of Paris was married to the capital of the Kingdom was to divide the unity of the King’s body. Therefore, it implied the division of the sovereignty as theorized by Bodin. Although the metaphor of the marriage was used before to justify a limitation of King’s power in property matters (and in particular to defend the principle of non-alienability of the Crown’s domain), this use was always inside the metaphor itself. The *Contrat de mariage* used another symbolic marriage, creating another *universitas*<sup>45</sup> and proposing an underlying institution that represented it. In other words, if the metaphor of the marriage could potentially produce an opposition to King’s will, this opposition laid in the matter that was objected, merely Crown’s transmission, King’s domain and taxation matters<sup>46</sup>. On the contrary, the proposition made by this pamphlet suggested that the opposition laid in the institution of the Parliament of Paris itself, giving it a considerable number of tasks that would be considered nowadays as ‘political control’.

Indeed, the *Contrat de mariage* exposed a more ambitious constitutional reformation of the monarchy that the one proposed and negotiated by the Sovereign Courts six months before. Albeit this pamphlet resumes the points accepted by the Regency in the declaration of October 1648, there are some specific points that show the fundamental political role of the Parliament of Paris. Among the propositions, we have three kinds of measures. The first related to the King and his Council: the Parliament should decide who were

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43 DESCIMON (1992), p. 1139.

44 *Ibidem*, p. 1133.

45 In the legal sense given by medieval jurists. See SICARD (2003) and CANNING (2003), pp. 233-236.

46 This were the accepted «laws of the monarchy (or kingdom)» since at least the end of the XVI century.

going to be the King's instructors (in his minority), as well as his counselors, and in times of regency all matters should be decided by the 'plurality of votes'<sup>47</sup>. This last pretension was clearly opposed to Parliament's actions at the beginning of the Regency, when he decided to partially quash Louis XIII's will to give 'absolute' power to Anne of Austria. The second measure was related to 'decentralized' government: the King should decide who was to be his financial administrators from a list proposed by the Parliament of Paris<sup>48</sup>. The third measure was directly related to the *universitas* created by the marriage: the government of Paris and his periphery should be nominated and provided by the Parliament of Paris<sup>49</sup>. As we can see, the tasks given by this pamphlet to the Parliament of Paris were beyond the political control traditionally exercised by it by the means of remonstrances. Here, the theoretical principle of the absolute monarchy in which all the authorities of the Kingdom come from the King is clearly conflicted. In practice, the Parliament of Paris was governing the city at this time (the *blocus* of Paris), confirmed with the Parliament's registers and *mémoires* from that time<sup>50</sup>. The magistrates were deciding day by day measures (what we would call today 'city administration'), explaining the extent of the propositions made by the *Contrat de mariage*.

However, this popular support in pamphlet literature was far from being exclusive to the magistracy, especially in regard to the progress of the events and in particular to the measures taken by the Parliament of Paris. Already in Mars 1649, the Parisian 'people' despised the decision of the Parliament of Paris related to the peace accord with the Regency, which included the acceptance of Mazarin as Prime Minister<sup>51</sup>. At the same time, even if this magistracy doctrine had an important support inside the Sovereign Courts, it was far from being unanimous<sup>52</sup>. At this time, the other *frondeurs* (and in particular the Princes) took an important part in the conflict, and tried to rally the pop-

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47 *Le Contrat de mariage du parlement*, p. 2.

48 *Ibidem*, p. 4.

49 *Ibidem*, p. 7-8.

50 See TALON (1828), vol. 2, p. 397.

51 For example, in the *Lettre d'avis à Messieurs du Parlement de Paris, écrite par un Provincial*; a digital version is available on Google Books.

52 This fact can be noticed in the debates at the general assembly of the Paris Parliament: LE BOINDRE (1997). Omer Talon also refers some disputes between magistrates: TALON (1828), vol. 2, p. 352 and 373. Some examples can be found also in MOOTE (1971), p. 151-154 and MADELIN (1931), p. 141-142. Hubert Carrier noted as well the ambiguous positions of the Paris Parliament after the Reuil's peace: CARRIER (2004), pp. 534-535.

ular force to their pretensions. The *Mazarinades* did as well, leaving aside the doctrine of the magistracy as an opposition.

To conclude, we can confirm that the *Mazarinades* echoing the political opposition done by the Sovereign Courts were part of a ‘public opinion’ (at least in Paris at the beginning of the conflict). However, the said public opinion containing an opposition to the government was merely related to matters of justice (arbitrary trials in principle) and depending on the animosity to Cardinal Mazarin (related at the same time to a certain xenophobia, in particular against Italians, quite usual at the time). On the contrary, it is inappropriate to say that pamphlet literature exposed a ‘public opinion’ on government or constitutional matters. In fact, the people largely approved the monarchy as a constitutional order, had an almost sacred image of his King, and was ignorant of the balance of power between the Sovereign Courts and the King and his Council<sup>53</sup>. The support of the public opinion to the *frondeurs* causes was more visceral than rational, just as the Cardinal of Retz noted himself: «the support [of the people] have just one time, and this time is not long enough, because of the thousands of accidents that can happen in the disorder»<sup>54</sup>. For the Parisian parliamentary opposition, this time ended in the spring of 1649.

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53 CARRIER (2004), pp. 23-29 and 73-78.

54 CARDINAL DE RETZ (1837), p. 161: cited by CARRIER (2004), p. 131.

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# THE METHODS FOR THE LEGITIMATION OF THE SUCCESSION OF JAMES II IN APHRA BEHN'S POEM FOR CORONATION

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## *1. The historical background*

The more challenges James II (1685-1688) had succeeding his brother Charles II (1660-1685), the more popular he was at the time of his coronation in 1685. He had to face the Exclusion Crisis (1679-1681) when the Parliament intended to exclude him from the succession of the throne by duly legal instruments. However, the Parliament was dissolved several times after short months of debates. Moreover, James and Charles was in danger in the Rye House Plot (1683) when Cromwellian veterans tried to murder them. James even had to fight two risings immediately after his succession but both the Duke of Monmouth and the Earl of Argyll were captured and executed, so his suitability to wage war and defend his country was unquestionable.

In 1673 everyone who held public office was forced to take the oath of supremacy and allegiance besides several anti-Catholic declarations considering transubstantiation upon the Test Act. Obviously this could not be taken by a Catholic, so among others James had to resign from his offices. This conduct was an open confession that James was a Catholic and led to exclusion crisis and to the fear of Papist conspiracies and invasion, especially after his marriage with Mary of Modena. This hysteria culminated in the Popish Plot (1678-1681) that was a fictitious conspiracy that James and the Jesuits wanted to assassinate Charles.

Nonetheless, James's succession was without any legal complications, and the parliament voted James all his brother's revenue, and, besides a new tax on sugar and tobacco. However, the Parliament refused to increase the number of the standing army that James so demanded. On the surface James and his people could have great expectations toward his reign, though their future lay in the continent and in the hands of the great giants of the 17<sup>th</sup> century Louis XIV and William of Orange. Unfortunately, the defeated one of their struggle was James himself<sup>1</sup>.

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<sup>1</sup> HILL (2002), pp. 193-199; GIBSON (2010), pp. 61-68; KENYON (1981), pp. 144-148; SCOTT (2014), pp. 228-229; BORUS (2007), pp. 78-164.

## *2. The panegyric poems for coronation as resources and instruments for the legitimization*

Briefly these were the direct problems emerging from the events which James had to solve. The indirect problems were the challenges of legality and legitimacy. Apart from the succession of James, how can the power legitimize its own existence? What are the means the power uses? Why does it choose the specific instruments for legitimacy? Mostly, until when does and can it avail these techniques?

To examine these questions, we have selected the panegyric poems upon the coronation of James II as resources. The reason for this choice is that this encomiast poetry has an ubiquitously declarative function. So the poems were published and available for the whole society, i.e. for those who could not participate in the coronation ceremony. The primary role of these poems lay in setting and broadcasting the events for the public.

Another reason for analysis is that the declarations are to be regarded as norms in the early modern age, because the Stuart kings – i.e. the power – published their decrees and orders made in the Privy Council in the form of declaration or proclamation. The poetry of the coronations of course are not declarations and proclamations formally and materially, though its role is quite similar to them, since it is to be available personally and territorially for the whole country.

A further scope of the poems is to express the ceremonial establishment of the power of the monarchs and to indicate that the *ex lex state* i.e. the interval between the late and the actual monarch ceased<sup>2</sup>. This way the poems bestowing encomiums on the monarchs and their glory are transformed into sort of declarative written texts. Our further proof is that these poems were several times published by the consent and financial subsidy of the monarch by the royal press.

So the publication of the poems was at least functionally and symbolically the enactment of the legal act of the coronation. Such publication was Francis Sandford's work<sup>3</sup>, that described the whole ceremony from the participants, through the environment, decoration until the last tiny cups and forks. The work even included dozens of drawings and tables. So Sandford fulfilled James's personal interest entirely with his opus.

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2 SASHALMI (2006b), p. 48 nt. 145.

3 SANDFORD (1687).

Knowing that our statement can be argued, we risk the allegation that the panegyrics had some consitutive character besides the declarative one. Our proof is that the lack of the coronation created a sort of hiatus in the legality of the changing of powers. Still, certainly not the panegyrics constituted the power of the monarch, and not even the coronation itself, but the order of the succession to the throne, the election of the monarch by the estates, the mutual oaths of loyalty (acts of homage) and the anointing with holy oil or chrism altogether<sup>4</sup>. However, in some parts and centuries of Europe the coronation itself was the main legitimate factor in achieving the power<sup>5</sup>. Yet, the validity of these act was performed by the information received about them to the people absent, so the information made the coronation undoubtedly normative. We regard the panegyrics constitutive in this and only this aspect.

This publicity made the people be aware of knowing to whom they granted obedience, especially when the power was so personal as in the early modern age. So certain kind of declarative factor was necessary to be monarch lawfully. This publicity was reached by the flow of panegyrics. Our hypothesis is that these poems must have had other aims and functions besides the record of the ceremony, the broadcast for the society and the publication of the coronation as a legal act. One is the very obvious and emmanent flattery and blandishment to the monarch in behalf of receving offices and donation, so it is just sycophancy. The immanent function that derives from the characteristics of the power and the text of the poems are slightly different. What were these immanent functions that the power so eagerly used to legitimize itself? My incentive is to reveal how the coronation poem of Ahpra Behn was the device for the legitimation of James II, though his title for the coronation was previously questioned, and his relentless Catholicism was a great obstacle and made fear of the Papists among the people<sup>6</sup>.

The poems were written in great quantity and quality, ranging from the poetasters to the real poets. The rhymesters' texts are only for adulation, however, the real poems are so complex that any time you read it, you can discover deeper and deeper layers to examine. The masterpiece of the poems

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4 KISTELEKI (2016), p. 136.

5 For further details for the exceptions and the essential elements of coronation in Europe, see ECKHART (2000), pp. 78-84.

6 For the theory of absoulitism see KISTELEKI (2011), pp. 68-105 and SASHALMI (2006a), pp. 11-38.

upon the coronation of James II, is the Pindarick Poem<sup>7</sup> upon the Coronation of James II by Aphra Behn (1640-1689) one of the first women poets, playwright of the Restoration era. Her poem was written in the style of Pyndar, however, it has a structure of an epic, and has thirty stanzas so it is necessary to highlight only the very important and relevant themes. For this analysis we have chosen the following subtopics: 1) the coronation as an occasion; 2) the invocation of the Muse; 3) the denomination of the Monarch; 4) the aims, the rights and the duties of the Monarch; 5) the duty of the people.

### 3. *The coronation as an occasion*

Since the coronation gives a cogent, necessary but not sufficient legal title for the power, it appears in the poems dozens times. The coronation and the anointing belong to the sphere of public law, so the poem about them reflects their message to the public. On the other hand, the acts of homage are in the terrain of civil law so their private component is stronger figuring the dynastic proprietorship of the state. While the personal component appears in the personal idoneity of the monarchs such as victories in wars<sup>8</sup>.

The epitheton ornaments for the coronation are among others that it is a *Divine Theme*<sup>9</sup> that are poeticized several times being at the same time a *Mighty*<sup>10</sup> and *Holy-Day*<sup>11</sup> as well. The divine and holy phrases refer to the anointing so to being the Chosen One, while they propagate that the ceremony is sacred and protected by God. We must appoint that in the age of wars of religion and knowing that James is an enthusiastic Catholic<sup>12</sup> these terminology are not just flowers of speech.

The expressed aim of the poem is *Beauty and Majesty*<sup>13</sup> so the aesthetic and the grandeur sphere begins to intermingle. The other zeal is «to tender sense»<sup>14</sup>. «That future Lovers when they hear, / Your all-ador'd and wond'rous

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7 Aphra Behn (1685). Further we cite only the number of the stanzas of the poem.

8 SASHALMI (2006b), pp. 102-103 and 125-126, KISTELEKI (2016), p. 136 and ECKHART (2000), pp. 78-84.

9 Several times in stanza III.

10 Stanza I.

11 Stanzas XIV, XV and XVI.

12 SCOTT (2014), p. 229.

13 Stanza III.

14 *Ibidem*.

character; (...) / May find the Holy Passions you inspire)»<sup>15</sup>. Since James had a widely known true passionate personality<sup>16</sup> that appeared in his deep religion and in his speeches everyone was aware that James's passion was holy. This way, the sentiments of lovers *in abstracto* are joined with the character of the king, meanwhile the sacred holy protection is given to the his future lovers i.e. the British people *in concreto*.

The combination of the sentiments and the senses with the help of passion and music opens Heaven and brings the mighty triumph that the Earth blooms and that a universal joy spreads throughout the world while harmony above the people emerges on the blessed day («And Heav'n all open'd to survey / The Mighty Triumphs of the Blessed Day: / And Earth had drest herself in all her Bloom, / And sent abroad a universal joy! / [...] all was Harmony above») <sup>17</sup>. This phrases are true Catholic terminology, forasmuch the universal joy literally means the universal good message i.e. the gospels of the Bible.

Due to the passion, the joy and the sanctity of the day, it is self-evident that the purposes of the ceremony are to disdain the vulgar thoughts, to eliminate the fatigues in and the worries of everyday life, to forget the pressing needs, to neglect the body, and finally not to complain at all, not to have the temptation of lovers. Since the day brings blessings and prophetic joy to the participants, the Paradise has arrived with James's coronation on this sacred holy-day («They disdain / A vulgar thought to entertain; / Big with Prophetick Joy, they lab'ring wait / To utter Blessings wonderful and great; / This day no rough Fatigues of Life shall vex, / No more Domestick Cares the mind perplex; / All common thoughts are lost in the vast crowd of Joy, / This Jubilee! this Sacred Holy-day! / The Soul resolves for Mirth and Play. / She leaves all Worldly thoughts behind, / And in Her hast out-strips the wanton Wind; / The Poor Man now forgets his pressing needs, / No Penury his exalted looks confess, / Neglects the Body, while the Soul he feeds / On fancy'd pleasures fearce arriv'd in guess. / No sad Complaints ascend the Sky's, / No Nymphs reproach'd in Lovers sighs, / Or Maid forsaken, bends her lovely eyes») <sup>18</sup>. We have seen the solemnity, the majesty, the dignity and the sacrality from the citations, and since these appear several times by the Muse, we are to scrutinize the invocations of the goddess.

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<sup>15</sup> *Ibidem*.

<sup>16</sup> KENYON (1981), pp. 144-148.

<sup>17</sup> Stanza IV.

<sup>18</sup> Stanza VI.

4. *The invocation to the Muse*

The poem starts this way: «Arise my Muse! Advance thy Mourning Head / And cease lamenting for the Mighty Dead!»<sup>19</sup>. At first it is easy to interpret get up, stand up my Muse, and stop crying for the dead king. This is the simplest narrative. The other names for the Muse are the continuation of this reading namely «soft Angel, little God, first Messenger of Heaven»<sup>20</sup>. We have seen above that the task of the Muse is to bring joy, happiness, love and music. However, if we elucidate the first two lines again, it has totally different layer.

In the second stanza the Muse is the one «to whom the Great Command was given»<sup>21</sup>. However, we must ask why a Muse needs the Great Command. This power for command and the divine attributes of the Muse, makes us to investigate again the first two lines: «Arise my Muse! Advance thy Mourning Head / And cease lamenting for the Mighty Dead!». Why is the Muse lamenting? The lamenting person is James, who even published his early declarations with mourning sentences for his late beloved brother. The function of the Muse is to inspire only. So the Muse must not lament because then she can not give inspiration. The monarch is lamenting, and the Muse does not need any power for command.

Therefore, the first two lines are dedicated to the king. The poet wants to write about the coronation to the monarch, so the king personalizes the coronation and the inspiration at the same time. The king is the Muse. And the verbs arise and advance are meant to describe the power that shall expand, and the metaphor for the ultimate power, the Sun. In this aspect, the arise is not for standing up, but it is for the verb expand and rule my Lord. The first Messenger of Heaven has again a different explanation, if we consider James's Catholicism, because then he is the vicar, i.e. the earthly representative of God. The Sun can refer to James's cousin, Louis XIV, the Sun King who was more or less the role king either for Charles II or James II.

Thus, there evolved a serious political programme from the poetic tropes and aesthetics. This policy of the monarchs is apparent if we uncover their denomination.

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19 Stanza I.

20 Stanza II.

21 *Ibidem*.



### 5. *The denomination of the Monarch*

The classical forms of denominations are to express his appearance and internal values such as «Beauty and Majesty in such a dress, soft Adonis<sup>22</sup>, Royal Hero, Hero of th'expecting World<sup>23</sup>, Royal Sir<sup>24</sup>, Charming Boy»<sup>25</sup>. These characteristics are too general. Knowing the Bloody Assizes of Judge Jeffreys after the uprisings in 1685 when Jeffreys executed hundreds of people, the phrase «Merciful as that, when e're he can redress!»<sup>26</sup> seems to self-defence.

James was a successfull soldier, admiral who even wrote a memoir of his experiences<sup>27</sup>. Therefore it is not surprising that he is Mars, the «God of War, Conquering God, New Courage to the fainting Troops He gave / And by His great Example taught'em to be Brave»<sup>28</sup>. Though the very core of exercising power is the command for the armed forces that gives the foundations for the power, this force without any intellectual encouragement is solely a matter of fact that is insufficient for any reasonable governance.

James appears again to have the religious attributes, however, these are combined with the martial virtues when he is a «Godlike Patron, Godlike King»<sup>29</sup> whose task is to defend its realm and people, and finally he becomes expressis verbis the «True Representer of the Pow'rs Divine!»<sup>30</sup> The titles «God of Luster»<sup>31</sup> and «Glittering Monarch»<sup>32</sup> are citing again the Sun, the metaphor of absolute and indivisible power that rules solely in the sky without any controll or influence. So the word monarch, literally meaning the sole power, come true. This function for defence and having the uncontrolled power appeared as well in the fireworks on the Eve of the Coronation where

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22 Stanzas III and VIII.

23 Stanzas II. and V.

24 Stanza II.

25 Stanza VIII.

26 *Ibidem*.

27 *Memoirs of the English affairs, chiefly naval, from the year 1660, to 1673. Written by His Royal Highness James Duke of York, under his administration of Lord High Admiral, &c. Published from his original letters, and other royal authorities, London, 1729.*

28 Stanza VII.

29 Stanza III.

30 Stanza VIII.

31 Stanza VII.

32 Stanza VIII.

the lights of the fireworks formed the words *PATER PATRIAE* and *MONARCHIA* in the sky. This was an unquestionable indication to the Sun King<sup>33</sup>.

Another important attribute is that James as a monarch is the father of the people. The society is a great family whose head is the monarch. The father of this theory was Sir Robert Filmer (1588-1653) who argued that Adam was the first man and head of family, a patriarch. The family of that time was to be considered a kingdom, so Adam was the first king and a patriarch in one person and therefore had unlimited absolute power. This power was a natural right of the kings because the existence of a family based on nature and it was identical to the political power of the kings. After Adam's death, all of his successors as patriarchs and kings gained his power, so the kings were Adam's successors or at least had the same powers as him. The subjects as members of this great family had unconditional obedience to the kings and any revolt was contrary to nature and God<sup>34</sup>. Filmer's main statement is the *Honour thy Father* from the Ten commandments that he enlarged to a political theory.

The patriarchalism had several meanings for the contemporaries. At first it meant that due to the direct line of succession i.e. the birthright James could not be excluded from the succession. That was the reason why James and Tories published Filmer's work only in 1679-1680, though he wrote it presumably in the 1630s<sup>35</sup>. The other meaning is the emotional binding force, since if the whole society is one family and the monarch is the patriarch, nobody would revolt against him. The reason for it is not due to the regulation and that it was a crime, a patricide, but by the concept of the family<sup>36</sup>.

James, the king is Adam in one person because he «(...) was the first Born-Man, / Heav'n did for an immortal Race design, / E're the first bright deluded Maid / To sense of Fear, the Lord of All betray's»<sup>37</sup>. Moreover, the poems describes and indicates to the emotional influence and layer of patriarchalism, since James shall be «(...) remaining as thou art, brave, Love, true / Thou, in by King, will find Father too»<sup>38</sup>.

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33 SANDFORD (1687), p. 125.

34 FILMER (1991).

35 SOMMERVILLE (1991), pp. xxxii-xxxiv. TUCK (1986), pp. 183-186 and CUTTICA (2012), p. 86.

36 For patriarchalism and Robert Filmer see further, KONTLER (1997), pp. 102-111, RIGÓ (2017a), pp. 66-75 and RIGÓ (2017b).

37 Stanza VIII.

38 Stanza XXV.

## 6. *The aims, the rights and the duties of the Monarch*

We had several connections with the aims, rights and duties so far, therefore this chapter only touches briefly them. Being a monarch does not mean that you can only enjoy life. This reflects to the late Charles II who was feasting like the ancient hedonists: «Shake off the downy pleasures from thy eyes; / And from the softest Charms of Love, Arise!»<sup>39</sup>.

Moreover, since the monarch, and only the monarch has the sword, the symbol of power, i.e. the right to use force and punish, his duty is «unusurpt maintain his Paradise»<sup>40</sup>. This means that it is the protection against the internal and external enemies. Yet, this obligation and aim can usually be executed by rules, regulation and waging war, thus James would bring light of the peace into the darkness of danger: «And with life giving Rule the God maintains / The Glorious Empire of the Sun. / And all things smile and thrive that are in Nature found. / Now fiercer Rays of Brightness he assumes, / And ev'ry Minute do's enlarge his Beams; / Till to the farthest Poles their Influence spread, / And scatter Plenty where his Glory's shed. / While all the guilty fannoms of the Night / Shrink from the Piercing terror of his Light!»<sup>41</sup>.

Finally, the wars inside and outside the realm, would lead to peace and the unification of Great-Britain would bring the glory so that the hostility was a thing of the past. However, besides the practical reasons, making peace is a divine obligation: «Each coming vulgar day, the Monarch show'd, / But this more Sacred, views Him all a God! / New youth and vigor fill His Royal Veins, / His Glorious Eyes young flames adorn; / A new Divinity in His looks, Proclames / That for Eternal Empire He was Born!»<sup>42</sup> (...) Fortune and Nature still agree to make / Each present minute gayer than the last: / This gives you Empire! while Three Nations pay / Their willing homage to your Scepters sway»<sup>43</sup>.

## 7. *The duty of the People*

The people had several functions in the political theories of the early modern age. On the one hand, due to the theory of popular sovereignty, the po-

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39 Stanza V.

40 Stanza II.

41 Stanza VII.

42 *Ibidem*.

43 Stanza XI.

people was the foundation of the power, therefore the monarch had only limited power whose limit is the people itself. Upon the social contract theories the monarch makes a contract with the people and the people delegates some or all of its power to the monarch. In the early modern age, the question was whether the people had the original power to delegate and transfer to the monarch, or the God had it and the people is only a transferor, or the people transferred the power to the king without withholding any part of it or it had maintained some for itself. These acts determined the creation of the forms of government, whether they should be parliamentary or constitutional monarchies, or monarchy or even republic<sup>44</sup>.

As we can see, the counterpart for parliamentarianism and popular sovereignty is the divine right and arbitrary power of the kings in which the people is not the subject and foundation of the power but the object. The people in this aspect is obliged to entire obedience<sup>45</sup>: «The sleepless Crowds their early duties show, / Th'attending Hierarchies of Angels bow»<sup>46</sup>. This is true even if the monarch's object is the salvation and protection of the people. In this context it is irrelevant whether the monarchs did acquired absolute power or it had only their main purpose to build one<sup>47</sup>. The reason for this is, that if the monarch having either full arbitrary or just some limited power on the people, ruled without his sense of reality and sobriety or with the lack of tactics and strategy, then he would override the limits of his power by his presumption about it. Moreover, the people can do anything but adore and bless him: «They in the Hero view'd their coming King, / And from Their wonder fell to Worshipping»<sup>48</sup>.

Therefore, it follows that the monarch wanted to possess both the divine, and secular power uncontrolled as being the divine ruler and having the arbitrary power so being absolute sovereign. The allegory is expressed evidently from the Old Testament, as James being Moses: «So when the Israelites all wond'ring stood, / With awful Rev'rence in the vale beneath, / They saw from far the Glory's of the God; / But to approach the Sacred Mount was Death! / His Dictates by the Holy Prophet came, / 'Twas He alone that did the pow'r

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44 For the summary of these theories see DZELZAINIS (2001), pp. 32-49, SMITH (2010), pp. 343-347 and KONTLER (1986), pp. 7-36.

45 KISHLANSKY (1996), p. 267.

46 Stanza V.

47 SCOTT (2014), p. 231.

48 Stanza XIII.

receive, / To hear th' Almighty's voice and live; / It was enough for them below to view the Heav'nly flame»<sup>49</sup>.

## 8. *Conclusions*

After having examined the poems and confronted it with the corresponding political events and theories, we can conclude that it has an intention other than to glitter the people and the monarch. We can make the statement that the coronation poem does fulfil the other purpose i.e. the legitimization of the monarch. This legitimization is carried out by the metaphors of the poem, because either the structure, the rhymes, or the pictures and the narrative are to broadcast the inner layer of understanding and interpretation of the poem. These metaphors and allegories are so multi-ambiguous that because of the pyndaric word order the subject and the object can be transposed and we can never be sure how to read it. This was the method by which the meaning and the purpose was stressed. Thus, Aphra Behn's Pyndaric Poem upon the Coronation of James II, after the relevant aesthetic approach, uncovers us the religious, absolutic, warrior and even the patriarchal conception of James II that has been traced and revealed through the metaphors.

Examining the poem, the above mentioned aesthetic and historical features of religion, power, wars, should be amended by the psychological methods for the legitimization of James II which are more serious than the visible declaration of powers in the poem. As we have seen, the poem was full with emotions that had the same purpose that the religious, historical and political legitimization. These emotions are to validate and ratify the significance of the coronation and are to make emotional bonds with the monarch so that none rebelled against him as the father or better to describe the patriarch of the nation.

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49 Stanza XI.

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BALZAC AND THE CRITICISM OF THE FRENCH CIVIL CODE  
IN THE FIRST HALF OF THE 19<sup>th</sup> CENTURY

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Our paper will aim to address the reflections on the French civil Code, still recent at the time, which are to be found in the French writer Honoré de Balzac's works. Law was omnipresent in the realistic writer's novels, especially in *La comédie humaine*. Hence it constitutes a window to the implementation of the Code Napoléon of 1804 in the French society, making it a relevant source for legal historiography. In fact, Balzac declared in the foreword of *La comédie humaine* that his books, describing French society between 1815 and 1848 (Restoration and Monarchy of July) competed with the vital records (État-Civil), i.e. the official register of births, weddings and deaths.

Although the still young Code was considered a masterpiece by some, especially lawyers, others believed it would lead to the destruction of traditional French society and even adversely affect the birth rate. The harmonisation that was so solicited during the Ancien Régime was sometimes criticised after the Revolution. Honoré de Balzac, a leading light of the French realistic literature of the 19<sup>th</sup> century, was part of this movement. For instance, the abolition of the right of primogeniture was for some, including Balzac, less than opportune as it acted like a «pestle whose perpetual game is splitting up the territory» and «will end up killing France»<sup>1</sup>.

But if he had reactionary views regarding property, he was, to the contrary, progressive in his ideas on women's rights, and above all very critical about the status given by the Code to married women and children born out of wedlock.

This article will on one hand identify the part Balzac played in the different waves of criticism of the French civil code in the first half of the 19<sup>th</sup> century and on the other hand show how the writer's works can contribute to a better knowledge of how civil law was actually put into practice at the time.

Honoré de Balzac was born in Tours 1799 and deceased in Paris in 1850, who was mainly known for his literary work. A luminary of the French realistic movement, he inspired authors such as Gustave Flaubert and Marcel

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1 *Le curé de village* (The village priest).

Proust. His greatest work was *La comédie humaine*, in which he tried to draw a faithful portrait of French society during the Restoration and the Monarchy of July by drafting a mosaic of ninety-one novels and stories. This work provided a highly detailed account of daily life for the common man, articulating aspects of reality that had been hitherto neglected due to their ugly or banal nature. Balzac wanted his work to be as close to reality as possible, which makes it an eligible historiographic source. This is particularly relevant because law, be it civil or criminal, is central to the author's work. Balzac describes a world where money and property are becoming of ever greater importance<sup>2</sup>. Another biographical element makes his books interesting for the study of legal history in particular: Balzac was initially a law student and worked at a solicitor's office and as the assistant of a notary clerk. He then abandoned his legal studies and started his writing career. He thus had a precise knowledge of law, and civil law in particular, and would have seen first-hand how the new civil code was applied in practice.

Not only did he have a clear-cut perception of French legal society but he actually wrote, at a young age, a few political essays and even thought about engaging in politics by preparing his application for the elections. He therefore had specific political views. Even if his political allegiances changed with time and his various love affairs, which leads people to wonder if he was either a liberal or a legitimist, we can identify certain fixed political themes in his various writings<sup>3</sup>. The interesting thing is that his political visions run through his novels, in particular in *La comédie humaine*.

From reading his political works and private correspondence, we know that Balzac was no partisan of absolutism, which had ended in 1789<sup>4</sup>. However, he had always been in favour of a strong power. Being a fervent monarchist<sup>5</sup>, he was nevertheless sickened by both the Restoration regime and the Monarchy of July<sup>6</sup>. For him, France needed to be a constitutional monarchy<sup>7</sup>, with a strong government over which the parliament, elected by a census suffrage, i.e. a tax-based voting system, had no motion of no confidence. Balzac was opposed to equal suffrage: the right to vote ought to be linked with prop-

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2 MOURIER (1996), p. 115.

3 LICHTLÉ (2007), p. 295.

4 *Ibidem*.

5 MOURIER, (1969), pp. 95-96.

6 LICHTLÉ, (2007), p. 315.

7 LICHTLÉ (2007), p. 318.

erty. The vast majority of the working class must not take part to political life. In 1848, he demonstrated his opposition to the Revolution and repeated his conviction that a strong power was needed to maintain public order<sup>8</sup>.

Balzac was both intimately familiar with the Civil Code of 1804 and not shy about criticising what he saw as its shortcomings. We can find various example in *La comédie humaine*, and trace the opinions of some characters back to his political works. For him, the civil code ‘urgently needs reform on some points’<sup>9</sup>.

In some respects, Balzac was quite conservative, even reactionary. For instance, in terms of inheritance law, he thought that the civil code was endangering French society. When he was younger he wrote an essay in defence of the right of primogeniture in which he railed against the equal inheritance rights for every child imposed by the *Code civil*. According to Balzac, primogeniture was vital on many levels. From a political point a view, it promoted nobility, which was necessary as a counterbalance to potential abuse of power on the part of the monarchy<sup>10</sup>. Primogeniture was also a means to maintain the aristocratic culture and spirit<sup>11</sup>. Moreover, he saw large land ownership as essential for the prosperity of society<sup>12</sup>. In his novel *The village rector*, the judge states that:

«The root of our evils lies in the section relating to inheritance in the Civil Code, in which the equal division of property among heirs is ordained. That’s the pestle that pounds territory into crumbs, individualizes fortunes, and takes from them their needful stability; decomposing ever and never recomposing, a state of things which must end in the ruin of France. The French Revolution emitted a destructive virus to which the July days have given fresh activity»<sup>13</sup>.

In addition to this, Balzac was a strong supporter of paternal authority<sup>14</sup> and deplored its diminution in the Code<sup>15</sup>. For him, society should be underpinned by the idea of family, and the Code’s emphasis on the individual

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8 MOURIER (1969), p. 90.

9 *Splendeurs et misères des courtisanes* (Scenes from a courtesan’s life).

10 LICHTLÉ (2007), p. 304.

11 LICHTLÉ (2012), p. 168.

12 LICHTLÉ (2012), p. 170.

13 *Le curé de village*, Paris, pp. 223-224.

14 FAILLIE (1968), p. 65.

15 DISSAUX (2012a), p. 50.

undermined this<sup>16</sup>. Without family groupings, not only is society at risk, but fragmentation of ownership precludes effective management of land:

«The code, which is considered Napoleon's greatest achievement, is the most Draconian work I know of. Territorial subdivision carried out to the uttermost, and its principle confirmed by the equal division of property generally, must result in the degeneracy of the nation and the death of the Arts and Sciences. The land, too much broken up, is cultivated only with cereals and small crops; the forests, and consequently the rivers, are disappearing; oxen and horses are no longer bred. Means are lacking both for attack and for resistance. If we should be invaded, the people must be crushed; it has lost its mainspring, its leaders. This is the history of deserts!»<sup>17</sup>.

Balzac saw inheritance equality as the key factor driving women to have ever fewer children, so as to avoid leaving their daughters a paltry dowry. The code was thus going to lead to a drop of the birth rate in France, which was at the time a growing argument for the reinstatement of primogeniture<sup>18</sup>. Hence his female characters complain about the fact that it is becoming ever more difficult for them to get married due to the division of fortunes, because their dowry has become too meagre. They therefore explain how families cheat by drafting false sworn statements demonstrating advance receipt of inheritance for their other children, so as to be able to endow their remaining daughters with bigger amounts. Balzac having worked in a clerk's office, we can be sure that this technique was actually used by resistant aristocratic families during the first decades following the introduction of the civil code.

«In a similar way, my younger brother, Jean de Maucombe, as soon as he came of age, signed a document stating that he had received from his parents an advance upon the estate equal in amount to one-third of whole. This is the device by which the nobles of Provence elude the infamous Civil Code of M. de Bonaparte, a code which will drive as many girls of good family into convents as it will find husbands for. The French nobility, from the little I have been able to gather, seem to be divided on these matters»<sup>19</sup>.

In other respects, Balzac comes across as relatively liberal. In *The country doctor*, he seems to feel sorry for the legal status of the children born out of

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16 DISSAUX (2012a), p. 51.

17 Louis Lambert.

18 PEYTEL (1950), p. 54.

19 Louis Lambert.

wedlock, and deplores their poor position in society<sup>20</sup>. In *Ursule Mirouët*, he further outlines his grievances with the unfavourable status of bastard children according to inheritance law<sup>21</sup>.

A recurring theme in Balzac's work is the social position of women. The author accuses the writers of the Code to have opted for a system that puts women under the guardianship of their husbands. In his view, they intentionally ignored the previous reforms that were introduced under the Germanic legal tradition in favour of the Roman system, which did not attribute women with legal personhood. Balzac considers that there is a contradiction between the Civil Code's gender inequality and society's deification of women<sup>22</sup>.

«The Code, my dear Paul, makes woman a ward; it considers her a child, a minor»<sup>23</sup>.

However, many of Balzac's female protagonists manage the shared matrimonial wealth in defiance of the spirit of the Civil Code and take on a much more legally active role than the Code intended<sup>24</sup>.

Balzac also accuses society of keeping women in a state of ignorance. For him, the ideal spouse should have received a 'man's education'<sup>25</sup>. He does not go as far as recommending that this type of education be extended to all, however<sup>26</sup>.

«Away with civilization! Away with thought! (...) That is your cry. You ought to hold in horror the education of women for the reason so well realized in Spain, that it is easier to govern a nation of idiots than a nation of scholars»<sup>27</sup>.

Moreover, Balzac often denounces the intrigues related to dowry and inheritance. The code favours calculations and lead to the venal exploitation of marriage:

«The wife is a piece of property, acquired by contract; she is part of your furniture, for possession is nine-tenths of the law; in fact, the woman is not, to speak correctly, anything

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20 PEYTEL (1950), p. 48.

21 MACÉ (2012), p. 345.

22 FAILLIE (1968), p. 21.

23 *Le contrat de mariage* (The marriage contract).

24 FAILLIE (1968), pp. 193-194.

25 FAILLIE (1968), pp. 34-35.

26 FAILLIE (1968), p. 190.

27 *Physiologie du mariage*, II (Physiology of marriage, II).

but an adjunct to the man; therefore abridge, cut, file this article as you choose; she is in every sense yours. Take no notice at all of her murmurs, of her cries, of her sufferings; nature has ordained her for your use, that she may bear everything, children, griefs, blows and pains from man»<sup>28</sup>.

The writer suggests through the character Oscar that women should be systematically stripped of their inheritance<sup>29</sup>, but he was not himself of such a radical opinion, an opinion which if implemented would destroy the existing balance of household financial management. In this instance, he took the financially useful role that the dowry played in the society of day<sup>30</sup>.

From a historiographical perspective, novels are a useful tool for understanding how the civil code was used or abused. Balzac had indeed declared in the foreword of *La comédie humaine* that he intended, with his novels, to compete with the vital records (État-Civil), i.e. the official register of births, weddings and deaths. Balzac gives us other testimonies of civil law put into practice. Some abuses seemed to have been a regular occurrence, like the exploitation declaring vulnerable adults legally incompetent<sup>31</sup> as an easy way of accessing their property<sup>32</sup>.

Although literature can serve as a useful tool for legal historians, it is important to be aware of its limitations. When attempting to discern the author's true opinion from his fictive works, it is necessary to support the inferred position with other external evidence before asserting that the position held by one of his characters represents his own stance. For example, Macé believes that Balzac was not sincere in his support of the right of primogeniture<sup>33</sup>. He maintains that whilst Balzac was in favour of large estates, it does not follow that he was against inheritance equality in contrast to all other authors who have written concerning the issue. Lichtlé, by analysing Balzac's politics, has amply demonstrated his conservative nature. In any case, one thing is certain: Balzac was a complex character whose views were both evolving and frequently contradictory<sup>34</sup>. In *The Elixir of Life*, he bitterly criticises the whole idea of inheritance, with a similar position to that of Saint Simon's

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28 *Physiologie du mariage*, II.

29 LICHTLÉ (2012), p. 167.

30 FAILLIE (1968), p. 191.

31 GARCIA (2012), p. 155.

32 SAINT-GERMES (1936), pp. 51-52.

33 MACÉ (2012), p. 350.

34 MOURIER (1996), p. 103.

followers<sup>35</sup>. He later rewrote this diatribe after P. J. Proudhon defended the need for familial succession<sup>36</sup>.

With a heady mix of tragedy and cynicism, Balzac portrays a justice system that often facilitates the triumph of the strong to the detriment of the right<sup>37</sup>. Balzac, a lawyer disappointed by the law<sup>38</sup>, is not naïve in his approach; but rather is aware that even if the writing of the Code were to be perfectly executed, it would always have its detractors, and its practical implementation would be far removed from its theoretical ideals<sup>39</sup>.

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35 MACÉ (2012), p. 340.

36 MACÉ (2012), p. 341.

37 MOURIER (1996), p. 41.

38 DISSAUX (2012a), p. 53.

39 LICHTLÉ (2012), p. 173.

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## Chapter VI

### Literary Environments for Criminal Law



# THE MEDIEVAL LEGAL PRACTICE OF EXCULPATORY OATH AND TRIAL BY FIRE IN THE LEGEND OF QUEEN ISOLDE\*

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## 1. *Introduction*

This paper, making a use of methods worked over by the law and literature studies will analyse one of the episodes of the legend of Tristan and Isolde, in which queen Isolde render the exculpatory oath with regard to the charge of adultery and is subject to the trial by fire. The research is utmost conducted in order to answer the question, whether the literary presentations of this scene reflect the proper legal practice of ordeal in Medieval France.

This analysis is also supposed to facilitate better understanding of the institution of medieval ordeals which is difficult for modern readers as it does not exist in contemporary legal systems. Finally, this analysis can also help understand the motivations of protagonists and their behaviour towards this kind of judgement and therefore it can help better interpret the meaning of this episode to the development of the plot.

## 2. *Tristan and Isolde legend*

It seems to be superfluous to repeat in this article the whole legend about the golden hair queen Isolde being, due to some unfortunate events, in love with Tristan, who is revealed to be the nephew of her own husband, king Mark. The reason for that is the fact that this story seems to be deeply grounded in the European culture and it even entered popular culture due to its adaptations to the big screen<sup>1</sup>. Moreover, it seems very difficult to reconstitute the only correct and coherent version of this legend because up till now there are

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\* The present article develops my previous research conducted on this subject; it focuses however on the legal aspect of the trial.

<sup>1</sup> It is enough to mention the very popular Kevin Reynolds' film entitled *Tristan and Isolde* from 2006 or the Italian Fabrizio Costa's film *Il cuore e la spada* released in 1998. There is even a cartoon French version of the legend, popularising this medieval legend among the youngest and we can also find some book adaptations for young adults and children.

numerous variants of it preserved and every one of them seems to add some new elements to this very old literary tradition, contributing to the production of the whole Tristan and Isolde story cycle<sup>2</sup>.

There are several medieval texts of this legend preserved in different languages. Two oldest versions are in ancient French. The first one is written by a man called by himself Bérout and it originates from between 1150 and 1200. The second one is written around 1170 by someone traditionally named Thomas of England. Unfortunately, both versions are not complete and the analysed episode does not appear in any of the preserved manuscripts of Thomas' work. We can however to a great extent reconstruct its contents based on later texts deriving from Thomas's version, namely the text by Gottfried von Strassburg from around 1210 and text of brother Robert entitled *Saga of Tristan* created around 1226 on the court of king Hakon of Norway, which is supposed to be, according to the research conducted on this subject, an accurate translation of Thomas's work.

The present analysis will be based mostly on the version of Bérout and on the *Saga* of Brother Robert. However, some connections with the most famous reminiscence on prose of the legend, which in fact is the attempt of the compilation of all the versions written in 1900 by a famous French medievalist Joseph Bédier will be made.

### 3. *History of the institution of ordeal*

The analysis of the exculpatory oath of Isolde and the trial by fire on her should be with no doubts begun by the presentation of the medieval legal institution of the ordeal. This task can be however very difficult as this institution is for us very mysterious and we don't even know its origins. Some ordeals are believed to be already presented in the Ancient Testament<sup>3</sup> and in some other texts providing form Antiquity, however, in European cultural circle we tend to identify their application with the Middle Ages and the popularisation of the Christianity<sup>4</sup>.

If it goes to the nature of the trial by ordeal, according to Rebecca V. Colman «[o]rdeals were ceremonially administrated physical tests used as a

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<sup>2</sup> We can for example recall a very short story written by famous medieval author Marie de France, called *Chevrefoil* (eng. *The Honeysuckle*) where the author presents her own vision of only one episode of this story where Tristan meets Isolde in the forest.

<sup>3</sup> VAN DER TOORN (1988), p. 427.

<sup>4</sup> RESZYŃSKI (2010), pp. 196-197.

form of proof»<sup>5</sup> and «their outcomes were interpreted as manifestations of divine judgment»<sup>6</sup>. They functioned therefore as tests calling for help of the divinity. Those tests normally consist on application of different kind of unpleasant and difficult experiments used onto the parties in dispute or the accused in the penal procedure, the results of which implied the judgment and penalisation. P. Brown notes that the result of this kind of trial was an upshot of different proofs: «The effect of a hot iron on the hand that could hold it for nine paces, of boiling water on the arm that had snatched and object from a cauldron, of whether a man sank (if innocent) or floated (if guilty) in a pool of water, the result of duel»<sup>7</sup>.

Knowing the essence of this institution we can easily understand that ordeals were used only if other evidentiary methods failed and if there was no other way to prove the truth demanded by many of medieval legal systems (for example *Lex Salica* demanded a 'certain proof')<sup>8</sup>. Trial by ordeal was therefore used when the evidence was either unavailable (like in cases of doubted fatherhood, unsolvable without DNA tests and so as above the competences of the human judges), or when in the particular case it was forbidden for the party to swear an oath (for example when he or her had been already sentenced for perjury)<sup>9</sup>. In those cases the only way to know what was the truth was to ask a divinity to solve the problem as gods can see things impossible to notice for the human reason.

The first evidence of application of the ordeals in Western Europe come from years 800-1200 (what doesn't exclude their usage before any source about them was written), while their 'golden era' is traditionally dated at 11<sup>th</sup> and 12<sup>th</sup><sup>10</sup>. It is also undeniable that the year 1215 constitute the twilight of ordeal's era. It was then when the legislation of Council of Lateran IV banned the clergy's involvement in conduct of the ordeals and this decision deprived ordeals of their sacral content by denying that God is present during this kind of trial<sup>11</sup>. As the institution was forbidden by the Church and as priests were no longer present during those trials, people were less willing to participate in it. Moreover, church propaganda began presenting trial by ordeal as a pagan

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5 COLMAN (1974), p. 582.

6 COLMAN (1974), p. 582.

7 BROWN (1975), p. 135.

8 COLMAN (1974), p. 578.

9 LEMESLE (2016), p. 17.

10 BARTLETT (1988), p. 13.

11 MCAULEY (2006), p. 473.

superstition as in the case of ordeal the «passage between the sacred and the profane» was from the beginning very easy, as notes P. Brown<sup>12</sup>.

In this place, it should be noted that the majority of preserved version of the legend on Tristan and Isolde derive from the undeniable fall of the époque of ordeals, so they rather recall the custom less and less used which could however still be connected with the times gone, in which the plot is placed. Therefore the introduction of this passage can be considered as an element or archaization of the story. It must also be added that the acceptance of the commonly agreed concept that the legend of Tristan and Isolde has Celtic roots<sup>13</sup> leads to the conclusion that the episode itself is younger than the original version of the legend and maybe this element derives from the times of its writing down the oral transmission.

#### 4. *The trial of Isolde from the literary perspective*

The analysed episode, namely the scene of the exculpatory oath and trial by fire differs between varied versions of the legend of Isolde. It begins unequivocally from convening the gossips spreading around on the court of King Marke about the indecent relation linking his beautiful young wife and his brave nephew. King, either asking for advice of his counselors (*Saga*), or with persuasion of unfriendly informers (Béroutl), wants to get to know the truth from the queen. Isolde defends herself against all those accusations and declares to be ready to swear an exculpatory oath (Béroutl) and proposes even to be tested by some kind of ordeal (other versions). At the same time, she informs Tristan and asks him to wait for her, dressed anonymously, on the road, which she would go onto the place of her swearing. Getting to this place, queen says that she is unable to walk through the marsh without having her expensive clothes dirty. Support is offered by Tristan dressed like a lepper Welsh (Béroutl's text) or pilgrim (other versions). He takes her on his back (Béroutl), or his arms (other), through the marsh. Then the queen arrives to the place of her swearing and swears an unequivocal oath, that no man besides king Mark, her husband, and the lepper who «like a carrying saddlebags animal» took her onto the other side of the marsh was between her thighs (Béroutl), or, in less literal versions, the queen swears that no one besides those two had her in his arms (other).

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<sup>12</sup> BROWN (1975), p. 135.

<sup>13</sup> *Tristan i Izolda*, p. XXXV.

In Bérout's version this episode ends in this place with unheard by the public declaration of the queen that she can be tested otherwise. In other versions (so probably alike as in the Thomas' version), after the oath there came the trial by fire (hot iron trial), after which the queen reaches the success and regains the trust of her husband.

### 5. *Isolde's trial from the perspective of medieval legal practice*

Searching for the answer on the question, to which extent the literary text reflect the historical truth, at first it must be observed that ordeals were in the Middle Ages often used with regard to women accused of breach of purity, or betrayal. In such circumstances they were used by king Lotar, who wanted to get rid of his wife Teutberg and accused her of sodomy and incest. So did Carolingian king Charles the Fat, whose wife in 887 was tested in trial by fire (hot plowshare), being accused of betrayal. Those examples could have been models of proceeding with unfaithful wives in the Middle Ages so the authors of medieval texts could have used those examples while inventing the plots of their works<sup>14</sup>.

Traditionally, we divide Medieval ordeal with regard to the number of participants onto two-sided (for example combat) and one-sided (trial by cold water, by hot water, by fire, etc.)<sup>15</sup>. The question why Isolde was tested with this particular kind of ordeal (trial by fire) seems to be very interesting. Probably the reason for this was her general situation. As a woman she was obviously unable to participate in any combat and on the land of King Marke there was no relative of her, who could have done it for her. She was conscious of it and in Bérout's text she claims, that she has no relative, who could start a war for her<sup>16</sup>. This fragment can be understood as a direct connotation to ordeal in form of an encounter.

As Isolde cannot fight to prove her right, in all the texts on the ordeals she is tested by the trial by fire and she does some steps hanging hot iron in her hand. Analysing later English versions of the legend, Ernest C. York points out that this kind of ordeal was frequently used on people of high rank as in

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<sup>14</sup> LEMESLE (2016), p. 16.

<sup>15</sup> DZIADZIO (2008), p. 423.

<sup>16</sup> It is important to remember that trial by combat was the most popular one in the French medieval literature and we can find a lot of examples of it for example in epic poems (*chansons de geste*).

ancient texts «the association of the hot iron ordeal with aristocratic groups is noted quite early»<sup>17</sup>. Therefore the trial by fire could have been used as Isolde was the king's wife. On the other hand, according to the historical sources providing from the Middle Ages more than half of ordeal conducted in the Middle Ages were trials by fire, namely connected with contact of the tested person with the incandescent objects (like horseshoes)<sup>18</sup> so maybe the author of the text simply used the kind of ordeal he knew the best and he considered the most popular.

The medieval legal practice is also reflected in the excerpts of the texts depicting the preparatory ceremonies, namely listening to the holy mas by the queen, giving alms (*Saga*) or simply praying before the trial (other). Medieval descriptions of the ordeals keep repeating that before the ordeal a mass should be done and prayers made<sup>19</sup>. They were without any doubt the proof of the good will of the person accused and it demonstrated his or her intention to rely on the will of God and on his judgement.

Even if there are a lot of similarities between texts of the legend and the medieval legal practice we can still find some differences between the real ordeal practice and the way how it was presented in analysed texts.

The difference, which is done immediately after such comparison is that queen Isolde left the test untouched and after crossing the prescribed number of steps (possibly nine feet as it was the traditional distance), holding hot iron, she showed to the public her entirely sound hands. However, the procedural practice did not demand that the person tested by ordeal suffered no injury. The whole procedure was based on the observation, how the wound gets better and whether the process of healing is undisturbed by infections and contagions, which could have been a sign that God does not protect such a person. This is why, after the trial, the hand of the tested person was bandaged and sealed for three days and after that was shown to the judges, who assessed, that the God (and truth) are on the side of the accused<sup>20</sup>.

The fact that Isolde left the trial entirely untouched means that the authors of the text wanted to prescribe to God even greater function than the one demanded by law. The trial by fire on Isolde seems to be some kind of miracle and this is how it was probably understood by the medieval audience.

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17 YORK (1971), p. 7.

18 LEMESLE (2016), p. 19.

19 LEMESLE (2016), p. 19.

20 Ho (2003-2004), p. 261.



It is also interesting that in all versions of the legend of Tristan and Isolde analysed in this article it is Isolde herself (more or less forced thereto by the circumstances) offers swearing an exculpatory oath. Also when ordeal are concerned, the initiative is also hers. According to R. Bartlett, it was very common in the Middle Ages that the accused persons treated ordeals as the last means to save their position, when all other means were against them. R. Bartlett also states that people offered to be subject to such a trial only to manifest the sincerity of their statements. This is why offers like this were often made in political processes<sup>21</sup>. Nobody truly expected that the trial will be actually done and it was rather awaited that the other side of the dispute would feel mercy and resign from putting the other subject to this very cruel kind of trial.

This is why the fact that Isolde claimed her readiness to be subject to trial by fire or «any other mean to render her innocence» does not have to mean that she really wanted those proceedings to be done. Maybe she expected that her husband would feel mercy and allow that no pain is suffered by his own wife. The evidence onto such a statements is an excerpt from Bérout's version, in which Isolde declared her readiness to be subject to the ordeal with words «If anyone wants me to anything more, I am ready»<sup>22</sup>. This declaration however remains unanswered and no ordeal is proceeded. Then we can reach the conclusion that those versions which depict the trial by fire show king Mark in a very negative perspective, making him a cruel person, ready to seriously injury his own wife. Moreover, we should note that this trace of king Mark character is also presented in English versions of the legend<sup>23</sup> so it was rather this trace of king's character which preserved in later versions.

The last interesting issue, which demands a vaguer analysis is the contents of the oath sworn by Isolde. It is a very famous literary example of ambiguous oath which is at first true, but in fact it is a caricature of the actuality. It is true that nobody else besides the king and the passer-by was between queen's thighs. It is also true that Tristan was the passer-by. Then it is true that queen had a sexual relation with the stranger and the whole proceeding was to proof the opposite. Then the scene even for the modern reader seems to be comedian, yet in the Middle Ages in must have been a contempt for the trial, in

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<sup>21</sup> BARTLETT (1988), p. 15.

<sup>22</sup> This is also the interpretation of this fragment given by GORECKA-KALITA (2006), p. 101.

<sup>23</sup> Cf. YORK (1971).

which the judge was the God himself. Isolde wants to cheat on God, put him on the test and therefore she committed a sin.

B. Lemesle interprets this fragment stating that this kind of unequivocal oaths were often presented in literary works from 12<sup>th</sup> and 13<sup>th</sup> centuries as a result of the general crisis of the institution of ordeal<sup>24</sup>. According to P. Brown such presentations of the institution of the ordeal as in Tristan and Isolde story were «a tiny outcrop of the vast bedrock of cunning with which medieval men actually faced and manipulated the supernatural in their affairs»<sup>25</sup>. We should agree with those two scholars that this fragment can show us how people of late 12th century were losing confidence in this kind of proceeding. It can be also added that this fragment could have been an element introduced by the writer, who was probably a religious person, to popularise the Church propaganda of this time, by ridiculing the ambiguous practice of ordeal and therefore by making a folk superstition of it.

## 6. *Conclusion*

Coming to the conclusion of this literary episode of the exculpatory oath of Isolde and the trial by fire on her from the perspective of law and literature may lead to very interesting conclusions. The research shows that the scene reflects a big dose of historical truth with regard to the practice of ordeals in the Middle Ages, but also certain exceptions to this. As a result, this kind of analysis could be of great value to the historians of literature. They allow to see the variances, which the traditional literary analysis will omit, which at the longer perspective could allow to ask questions about the reasons thereto and then the meaning of the analysed scene to the entire work. It also helps position the excerpt in broader historical context and accept it as an interesting evidence of the attitude of people of the Middle Ages to the practice of the ordeal, which already then have ceased to be a way to prove the truth because as states H. L. Ho «in the practices of the ordeals faith mingled with superstition, justice with mercy, divine providence with human manipulation»<sup>26</sup>.

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24 LEMESLE (2016), p. 6.

25 BROWN (1975), p. 139.

26 HO (2003-2004), p. 259.

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BETWEEN LAW AND LITERATURE.  
VIOLATIONS OF LEGAL RULE IN THE *DECAMERON*

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1. *Boccaccio's cultural formation: neither a merchant nor a jurist*

Boccaccio considers law and poetry in various writings. His critical view of jurisprudence may have an autobiographical explanation: according to a report about himself in the *Genealogie deorum gentilium*, Boccaccio studied canon law approximately for six years because of his father's wishes and considered the legal training a mere waste of time<sup>1</sup>. The socio-political rele-

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<sup>1</sup> Boccaccio was born into a Florentine family of merchants in 1313, probably in the town of Certaldo. After spending his childhood in Florence, he moved to Naples with his father Boccaccino, a stockbroker for the Bardi family. Boccaccino soon saw, with great disappointment, that his son was not at home in the offices of money changers; on the contrary, he preferred to devote himself to literary studies. Therefore, after trying to distract him from these interests, which were completely alien to the market, he enrolled his son in law at the University of Naples, where he could acquire much familiarity with that dialectical method, which has been an integral part of legal education since the XIII century with the advent of the school of Commentators. At the *Studium* he could avail himself of the *magisterium* under the poet and jurist Cino da Pistoia (in fact Cino taught in Naples for one or perhaps two academic years, from 1330 to 1332: a circumstance that is believed to have allowed Giovanni Boccaccio to know him personally. Support for the two-year duration of Cino's teaching in Naples can be found in BRANCA (1977), p. 31; an argument for only one academic year can be found in DE BLASIS (1886). On the question of the probable contact between Boccaccio and Cino da Pistoia, see: BRANCA (1977); BRANCA, RICCI (1969); RICCI (1965); RICCI (1971); BATTAGLIA RICCI (2007); BATTAGLIA RICCI (2013). On aspects of culture in Naples at the beginning of the XIV century, and on the relations between the juridical production of the *Studium* and the politics of the sovereigns, see MONTI (1924); SABATINI (1975); KELLY (2003), pp. 26-31. In any case, the irremediable contrast between paternal ambitions and poetic vocation clearly emerge from an autobiographical page of the *Genealogie deorum gentilium*, in which mercantile and juridical activity are decidedly rejected because of an *affectio* towards poetry: «Verum ad quoscunque actus natura produxerit alios, me quidem, experientia teste, ad poeticas meditationes dispositum ex utero matris eduxit et meo iudicio in hoc natus sum. Satis enim memini apposuisse patrem meum a pueritia mea conatus omnes, ut negociator efficerer, meque, adolescentiam non dum intransentem, arismetrica instructum maximo mercatori dedit discipulum,

vance of academic law in the late Middle Ages was nonetheless significant as a personal motivation of the poet. Within the ever-more differentiated fields of knowledge – medicine, law, theology, philosophy and poetry – the growing influence of jurisprudence prevailed. The emergence of a legal system that was structured according to scientific bases and founded on a rediscovery of the *Corpus Iuris Civilis*, along with the advent of training for professional jurists in the XII century led to profound social and cultural changes<sup>2</sup>. The jurists exercised their influence on all political and ecclesiastical levels and held important positions in both the Church and State. The link between literature and law in the Italian and European Middle Ages was therefore quite strong, not only from the material perspective that, as we have seen, refers to the fact that lawyers were often holders of power and culture, but also from a theoretical perspective<sup>3</sup>. The problem of interpretation, like that of language and *auctoritates* to be utilised, is, in fact, a fundamental aspect of legal science. It is no coincidence that medieval glossators and commentators openly turned to literary texts where there was no *auctoritas* of reference<sup>4</sup>. Litera-

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quem penes sex annis nil aliud egi, quam non recuperabile tempus in vacuum terere. Hinc quoniam visum est, aliquibus ostendentibus indiciis, me aptiorem fore licterarum studiis, iussit genitor idem, ut pontificum sanctiones, dives exinde futurus, auditurus intrarem, et sub preceptore clarissimo fere tantundem temporis in cassum etiam laboravi. Fastidiebat hec animus adeo, ut in neutrum horum officiorum, aut preceptoris doctrina, aut genitoris auctoritate, qua novis mandatis angebar continue, aut amicorum precibus seu obiurgationibus inclinari posset, in tantum illum ad poeticam traebat affection (...). Factum est ut nec negociator sim, nec evaderem canonista» in Boccaccio, *Genealogie deorum gentilium*, XV, 10, 6-8. On this text see, for instance, the work of DI FRANZA (2015). In the *Sacrae famis*, wherein Boccaccio's aversion to the study of canon law is explicitly declared, the author justifies the loan request of the *Thebaid* by citing his urgent need to find books that could offer relief from the tedium of the *Decretales* (Boccaccio, *Epistole e lettere, Epistola IV Sacrae famis*, p. 538).

2 In these times a legal education was less technical, more humanistic, as much a preparation for the world of practical affairs as for the court itself and it was compatible with a literary avocation as any other training might have been. For most of its early history the study of law was closely connected with that of rethoric. Writers and lawyers both live by words, and pleading a case of drafting a judicial decision requires no less art than writing a narrative poem.

3 For England, see ALFORD (1977); CLANCHY (1979). For France, see BLOCH (1977); DI FONZO (2016), pp. 21-22.

4 Exemplary, in this regard, was Alberto Gandino who admitted to the possibility that the truth of law was reached through the use of extra-legal *auctoritates*, when these did

ture became an authoritative source of law and the law sometimes played a literary role<sup>5</sup>.

In this context, Boccaccio addresses the issue from a new and different perspective, which is the result of his unconventional education and clearly emerges in his writings. In fact, the unique interweaving of such heterogeneous experiences and professional skills gave Giovanni the opportunity to experiment with highly innovative forms and models of writing<sup>6</sup>. The mer-

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not adequately help with the doctrine or ruling for a specific case. In this sense, appealing to the literary authorities did not have, for the jurist of Crema, a merely exhortative purpose, but that of a true integration of a legal order that was open and intended to resolve issues of justice with the support of auxiliary knowledge. On this point, see QUAGLIONI (1999) e QUAGLIONI (1999), pp. 147-152.

5 It occurred, for example, that a song by Dante became an authoritative basis for dealing with the thorny issue of *dignitas* and *dignitates* from a purely legal perspective. The *repetitio* by Bartolo da Sassoferrato to *l. Si ut proponitis* (comm. ad C. 12.1.1, in *Commentaria in Tres Codicis, doctissimi viri Do. Petri Pauli Parisij Cardinalis admodum reverendi non paucis additionibus nuper illustrata, accurateque castigata*, n. 46, f. 55rb) was nothing more than a commentary on the song *Le dolci rime d'amor ch'io solia*, which was included in the *Convivio* (Tract. IV, third song, pp. 124-128). On this question see DI FONZO (2016), pp. 21-22. What's more, one thinks of Jacobus de Teramo (1349-1417) who wrote the *Liber Belial* (or *Consolatio peccatorum*), having been subjected to a trial brought by the devil against Jesus. In this, the author, whilst engaging theological issues and enduring the political events of the time (the Western Schism was underway), revealed his forensic knowledge by offering the reader a clear explanation of the civil process in all its stages. Precisely because of its legal content, which renders it a genuine manual of medieval procedural law, the book titled *Processus Luciferi contra Jesum coram Iudice Solomon* was to become one of the most widely translated and printed books in Europe in the XV and XVI centuries, before being banned by the Council of Trent and included in the first edition of *Index of Prohibited Books* published in 1559. On this point, see QUAGLIONI (2005), p. 50, nt. 32; MASTROBERTI (2012a), pp. 1-6 and MASTROBERTI, VINCI, PEPE (2012b).

6 The study of canon law seems to have left an impression on Boccaccio's cultural baggage when it came to terms and techniques, as clearly emerges in *Genealogie* (for the text, *supra*, nt. 1). It is sufficient to look at the expressions that the author adopts to define the paternal choice to start with such activity: in fact the terminology used could in fact be found in the university, where auditing often had the meaning of 'attending a lesson or a course' and was usually accompanied by an object complement that specifies the type of teaching. Since the object of «*auditurus*» in the text is the «*pontificum sanctiones*», which by synecdoche indicates canon law, the expression in question must mean, in a specific or technical sense, «that I began to attend the courses (the course) of canon law»; WEIJERS (1987), pp. 283-284 and TEEUWEN (2003), p. 224.

cantile aspect remains preponderant in his work, especially in the *Decameron* so much so that Vittore Branca was led to define the collection of short stories as «an epic of merchants»<sup>7</sup>; nonetheless, a legal substratum appears more discreetly «in the fantastic baggage of Boccaccio», disseminated here and there in various works. In any case, while the legal chapters of works such as the *De casibus virorum illustrium* and the *Genealogie deorum gentilium* see Boccaccio resort to and develop the common *topoi* of satire and criticism towards jurists, denouncing their *avaritia* in particular<sup>8</sup>, a more nuanced differentiation between representatives and institutions – as well as between forms of thought and legal reasoning – can be observed in the *Decameron*<sup>9</sup>.

The aim of this article is to investigate a particular aspect of the relationship between law and literature in the *Decameron* and in particular the essential relation between the natural law and positive law. The first one has an

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7 BRANCA (1990); BRANCA (1992), p. xlii, but also BATTAGLIA RICCI (2013), p. 41.

8 It is quite evident that Boccaccio had given considerable thought to the question of possible boundaries between law and poetry, as seen in the lengthy fourth chapter of book XIV of *Genealogie deorum gentilium*. In the apology for poetry in the *Genealogie deorum gentilium* books XIV and XV, Boccaccio cited these same fields. He addressed a polemic against the law by resorting to arguments similar to those of Petrarch in *Invective contra medicum*. Born for poetry, Boccaccio established a stark opposition between jurists and poets. The lawyers «have no business with poets, nor poets with them. Poets sing their songs in retirement; lawyers wrangle noisily in the courts amid the crowd and bustle of the market. Poets long for glory and high fame; jurists for gold (...). Poets are friends of peace; lawyers of cases and trials» in OSGOOD (1956), p. 32. Boccaccio then critiques the legal profession in the *Genealogie deorum gentilium*, discussing lawyers' greed as well as the law's (inferior) relationship to poetry. Yet it is evident from Boccaccio's personal correspondence that he used his legal training well into later life. In a letter to Mainardo Cavalcanti, Boccaccio refers to advice given to his friend, who at the time of the letter had just married a distant relative. Consanguinity was a serious impediment to marriage according to canon law, but on Boccaccio's counsel, Mainardo married quickly and secretly, receiving a papal dispensation to sanction the marriage only after it had taken place. Finally, also in *De casibus virorum illustrium*, the author levels a ferocious attack against lawyers, decrying their «feigned gravitas, tongues of honey, teeth of iron, and insatiable hunger for gold». In other passage, he insists: «They (the jurists) are like jackasses in robes. The problems they do not understand they ignore. Shamefully they try, if they can, to corrupt the law and they apply all their efforts to deprive it of its simplicity and sanctity so that they can spread an unwelcome discord among people (...)», in Boccaccio, *De Casibus Virorum Illustrium: The Fates of Illustrious Men*, pp. 95-96.

9 MAZZOTTA (1986); CHIAPPELLI (1988) (which is the source of the quotation); CHERCHI (1983) pp. 89-99; BATTAGLIA RICCI (2002); SHERBERG (2011), pp. 59-106; CONETTI (2015-2016).



important role in the *cornice* of the *Decameron*; some novels instead question the ability of the established law and its representatives to regulate and apply justice. In this article I will try to examine this dichotomy. After the analysis of the frame concerning its foundation in natural law, there will be two particular cases – that of Martellino and of Madonna Filippa – in which the legal order does not stand because it can be circumvented by the cunning who mock the laws and their application. The main objective will be to observe how Boccaccio transforms his critical vision of the very funny novella law and how it contrasts jurisprudence and poetry.

## 2. Law and Order in the *Decameron*

The main events of the *cento novelle*, as described in the prologue of the first day, take place in Florence<sup>10</sup>, during the plague of 1348, when every law – whether religious, civil or moral – has ceased to be valid:

«In this extremity of our city's suffering and tribulation the venerable authority of laws, human and divine, was abased and all but totally dissolved, for lack of those who should have administered and enforced them, most of whom, like the rest of the citizens, were either dead or sick, or so hard bested for servants that they were unable to execute any office; whereby every man was free to do what was right in his own eyes»<sup>11</sup>.

«The lack of those who should have administered and enforced them» (laws) has caused both legal and moral consequences; even the exiles for crimes have returned to the city, because the members of judicial organs are «dead or sick». Even religious laws – Pampinea, the most resourceful and oldest of the seven women's group in the *Decameron*<sup>12</sup>, calls them «divine» –

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10 «Egredia città (...) oltre a ogn'altra italica bellissima» in Boccaccio, *Decameron*, *Introduzione*, § 8, p. 12.

11 «E in tanta afflizione e miseria della nostra città era la reverenda autorità delle leggi, così divine come umane, quasi caduta e dissoluta tutta per li ministri e esecutori di quelle, li quali, sì come gli altri uomini, erano tutti o morti o infermi o sì di famiglie rimasi stremi, che ufficio alcuno non potean fare; per la qual cosa era a ciascun licito quanto a grado gli era d'adoperare» (Ivi, § 23, p. 15).

12 A group of seven young women and three young men flee from plague-ridden Florence to a deserted villa in the countryside of Fiesole for two weeks. To pass the evenings, every member of the party tells a story each night, except for one day per week for chores, and the holy days during which they do no work at all, resulting in ten nights of storytelling over the course of two weeks. Each of the ten characters is charged as King or Queen of the

are not observed: substantially, because of the pestilence, not only social and family relations have disappeared, but also the precepts of law according to the Roman tradition have not been respected<sup>13</sup>.

Considering that positive law has lost its value<sup>14</sup>, Pampinea proposes to her companions to retreat to the countryside and states that seeking shelter and protection is legitimized by «natural reason».

«Dear ladies mine, often have I heard it said, and you doubtless as well as I, that wrong is done to none by whoso but honestly uses his reason. And to fortify, preserve, and defend his life to the utmost of his power is the dictate of natural reason in everyone that is born. Which right is accorded in such measure that in defence thereof men have been held blameless in taking life. And if this be allowed by the laws, albeit on their stringency depends the well-being of every mortal, how much more exempt from censure should we, and all other honest folk, be in taking such means as we may for the preservation of our life?»<sup>15</sup>.

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company for one of the ten days in turn. This charge extends to choosing the theme of the stories for that day, and all but two days have topics assigned. Only Dioneo, who usually tells the tenth tale each day, has the right to tell a tale on any topic he wishes, due to his wit. For the specific privilege of Dioneo, which is justified as an infraction authorized by the whole group, see BATTAGLIA RICCI (2007); WILKINSON (2014); CAPPELLETTI (2017).

13 «L'uno cittadino l'altro schifasse, e quasi niuno vicino avesse dell'altro cura, e i parenti insieme rade volte o non mai si visitassero (...) l'un fratello l'altro abbandonava, e il zio il nipote (...) e, che maggior cosa è e quasi non credibile, li padri e le madri i figliuoli, quasi loro non fossero, di visitare e di servire schifavano», but also «assai n'erano di quelli che di questa vita senza testimonio trapassavano» (ivi, § 27 and § 34, pp. 48-50). On this paragraph, BARBERI SQUAROTTI (1970), spec. p. 111.

14 The temporary absence of the laws is also reiterated in the *Conclusion* of the sixth day, when Dioneo tells his companions not to be bribed by the negative examples generated by the plague: «Or non sapete voi che, per la perversità di questa stagione, li giudici hanno lasciati i tribunali? Le leggi, così le divine come le umane, tacciono? E ampia licenzia per conservar la vita è concessuta a ciascuno?» in Boccaccio, *Decameron*, *Conclusion*, VI, § 9, p. 550.

15 «Donne mie care, voi potete, così come io, molte volte avere udito che a niuna persona fa ingiuria chi onestamente usa la sua ragione. Natural ragione è, di ciascuno che ci nasce, la sua vita quanto può aiutare e conservare e difendere: e concedesi questo tanto, che alcuna volta è già addivenuto che, per guardar quella, senza colpa alcuna si sono uccisi degli uomini. E se questo concedono le leggi, nelle sollecitudini delle quali è il ben vivere d'ogni mortale, quanto maggiormente, senza offesa d'alcuno, è a noi e a qualunque altro onesto alla conservazione della nostra vita prendere quegli rimedii che noi possiamo?», ivi, § 53, pp. 21-22.

Two questions arise immediately: Why does Pampinea mention «natural reason» as the motivation for escaping from the city? Why exhorts his listeners to use «ragione onestamente»? In a note accompanying the text, Branca emphasizes the repetition of the word «honest», a word continuously varied as it becomes the cipher of the human temperament of the storytellers in the introduction<sup>16</sup> and conclusion. But the semantic area represented by honesty also involves other aspects of the discourse, the «natural reason», that appears at the beginning of Pampinea's speech. Honesty is a self-discipline, modesty, sense of limitation and decorum, but also a social value, virtuous behaviour, as Dante defines it in the *Convivio*<sup>17</sup>. Furthermore, Pampinea's speech can be considered the core of the *Decameron*'s action and it establishes the ethical conditions of the flight of the storytellers from Florence and prides them with reasonable ideological motivation. This speech aims at demonstrating that escaping from the city is not at odds with moral classical antiquity. Paolo Cherchi maintains that, in order to understand the meaning of honesty, we need to refer first to Cicero's *De officiis* because this work clearly illustrates the principle of self-preservation that underlines the ethical system of Stoicism<sup>18</sup>. But, as Giuseppe Mazzotta correctly noted, this mention evokes the so-called *ius naturalis* that is inherent in man, and imposed by nature upon all people<sup>19</sup>. The use of natural reason is the means to create order in the *Decameron*. This is the motive because of all of Pampinea's speech is formulated upon legal foundations: besides the connection with jurisprudence and canon law – she cites the definition of natural law given by Isidore of Seville in the *Etymologiae* and canonized in the *Decretum Gratiani*<sup>20</sup> –, the theory of *lex naturalis*

16 I. 52, 53, 54, 55, 61, 65, 72, 82, 84, 91; X. 4-5 and 6-8.

17 «Cortesia e onestade è tutt'uno» in Dante, *Convivio*, tract. II, chap. 10, p. 57.

18 «Principio generi animantium omni est a natura tributum, ut se, vitam corpusque tueatur, declinet ea, quae nocitura videantur, omniaque, quae sint ad viendum necessaria anquirat et paret (...). Commune item animantium omnium est coniunctionis appetitus procreandi causa et cura quaedam eorum, quae procreata sint», in Cicero, *De officiis*, I, 11; on this point, see CHERCHI (2004). On the definition of *honestum* as the Ciceronian translation of the Greek *kalòn*, see also POHLENZ (1970), pp. 35 ss. The parallel with ciceronian stoicism thought are fundamental to explaining all the variants of honesty in the *Decameron*.

19 MAZZOTTA (1970), pp. 221-222; ANDREI (2017), p. 185.

20 *Decretum Gratiani*, I, D. I, c. 7, col. 2: «Ius naturale est commune omnium nationum, eo quod ubique instinctu naturae, non constitutione aliqua habetur, ut viri et feminae coniunctio, liberorum successio et educatio, communis omnium possessio et omnium una libertas, acquisitio eorum, quae celo, terra marique capiuntur; item depositae rei uel

is also part of a larger pattern of medieval thought, whose major proponent is Thomas Aquinas. According to Aquinas, there are true directives of human action that arises from the very structure of human agency and that anyone may easily formulate for himself. Natural law is also the peculiarity human way of participating in *lex aeterna* whereby God governs the universe<sup>21</sup>. Since everything we are inclined to do according to our own nature belongs to natural law, the inclination of the human being is to act according to reason. That is why Boccaccio uses the term «reason» instead of «law».

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commendatae pecuniae restitutio, uiolentiae per uim repulsio. §. 1. Nam hoc, aut si quid huic simile est, numquam iniustum, sed naturale equumque habetur». See also in *Corpus Iuris Civilis*: D. 1.1.3. Gratianus repeatedly reflects on natural law. The starting point is the observation that mankind is governed by natural law, which is immutable, and customs, which are instead linked to times and places; then he specifies the concept and highlights its fundamental theological character: «Ius natural est quod in Lege et Evangelio continetur». On this point, see PARINI VINCENTI (2016), spec. p. 633, nt. 23.

21 The classic exposition is that of Thomas Aquinas, still very influential in the early Renaissance. In its simplest form the theory holds that there are three main divisions of law: divine, natural and positive. The definition of divine or eternal is almost taken from St. Augustine: «The eternal law is the divine order or will of God, which requires the preservation of natural order, and forbids the breach of it», in Augustine of Hippo, *Contra Faustum Manichaeum*, XXII, 27, trans. in *The Writings Against the Manichaeans and Against the Donatists, I, The Manichaeans*, p. 311). This law is not directive in the sense of human law but is rather the principle or essence of law, without which all particular laws would be meaningless. St. Augustine emphasizes that the temporal ruler, if he is good and wise, consults the eternal rule, for «nothing is fair and legitimate in temporal law which men have not drawn for themselves from the eternal law», and John of Salisbury echoes the idea when he declares in the *Polycraticus* that «Law is null and void that does not bear the image of divine law», in Augustine of Hippo, *De libero arbitrio*, I, 6, quoted by Thomas Aquinas in *Summa Theologiae*, I<sup>a</sup>-II<sup>ae</sup>, qu. 90-97, q. 93, art. 3, p. 59 and John of Salisbury, *Polycraticus of the frivolities of Courtiers and the Footprints of Philosophers*, IV, 6, p. 41, cited also by T. Gilby, p. 59). But how can the ruler know what the eternal law is? Man as a rational creature is a participant in the eternal law. The natural law is precisely the participation of the eternal law in the rational individual. The third type of law is the *lex humana*, necessary to regulate the concrete and historical situations that arise in society, in application of the principles of natural law; but, for Thomas, the supernatural end to which man is ordered makes the reference to natural law insufficient; it's necessary a higher guide constituted by the precepts of the *lex divina*. Thomas Aquinas, *Summa Theologiae*, I<sup>a</sup>-II<sup>ae</sup>, q. 90, art. 1 and q. 91, artt. 1-5. See, among others: PIZZORNI (1999), pp. 27-28; PIZZORNI (2003), pp. 291-293; DI BLASI (2017); MAGLIO (2014), pp. 131-135. On the concept of law and order in the Middle Ages, see the fundamental study by GROSSI (2011), *passim*.

If Pampinea's natural reason is the natural law theorized by Aquinas<sup>22</sup>, the meaning of «honest» must be appropriately attributed to Thomistic ethics. All the particular aspects of the natural law are contained in a more universal first principle: «bonum est faciendum et prosequendum, et malum vitandum»<sup>23</sup>, namely «good is to be done and to be pursued, evil is to be avoided». From the general principle of seeking the good and fleeing from the opposite, the first commandment arises to preserve one's life. In fact, Thomas maintains that the first inclination of man is the preservation of existence, and whatever is useful to preserve human life belongs to natural law.

As a second deduction, Thomas takes up the definition of the natural law of the *Corpus Juris Civilis*, according to which «ius naturale est, quod natura omnia animalia docuit (...) idest maris atque feminae coniunctio, quam nos matrimonium appellamus, hinc liberorum procreatio»<sup>24</sup>. The fact that natural law does not amount to human instincts is reflected in the third deduction: this fact also regulates the search for knowledge of God and life in the community, according to the Aristotelian definition of man as a political animal<sup>25</sup>.

Applying these thoughts on natural law to the Florentine situation, Pampinea's speech aims at demonstrating that escaping from the city is appropriate («honest») for everyone and is not at odds with moral values or civil laws. This passage clearly illustrates the principle of self-preservation, guided by reason and oriented around the *bonum*<sup>26</sup>. For Thomas, in fact, in man there is first of all an inclination to good in accordance with the nature which he has in common with all substances: inasmuch as every substance seeks the preservation of its own being, according to its nature; and by reason of this inclination, whatever is a means of preserving human life and warding off

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22 *Lex naturalis* is «Quasi lumen rationis naturalis, quo discernimus quid sit bonum et malum», in Thomas Aquinas, *Summa Theologiae*, I<sup>a</sup>-II<sup>ae</sup>, q. 91, art. 2. On the problem of natural law, for an updated bibliography, see MAGLIO (2014), pp. 138-141, nt. 65

23 Thomas Aquinas, *Summa Theologiae*, I<sup>a</sup>-II<sup>ae</sup>, q. 94, art. 2, p. 80.

24 D. 1.1.1.

25 Thomas Aquinas, *Summa Theologiae*, I<sup>a</sup>-II<sup>ae</sup>, q. 94, art. 2, p. 80. It should be noted that Boccaccio possessed a copy of the Nicomachean Ethics in the Latin translation of William of Moerbeke, with the comments of Thomas Aquinas, executed in 1260. The Aristotelian text was probably available to him, but there is no doubt that Boccaccio possessed the commentary by Thomas Aquinas. It is the ms. Ambrosiano 204 inf., belonging to Boccaccio's private library. For the code date as well as discussion on the part of Boccaccio see BARSELLA (2006).

26 Thomas Aquinas, *Summa Theologiae*, I<sup>a</sup>-II<sup>ae</sup>, qu. 18-21, q. 19, art. 7, ad. 3, p. 70.

its obstacles, belongs to the natural law. For this reason, after the ten young people left Florence and arrived in the villa, the urgency is to begin to rebuild the order that the plague, without the laws and those who administer them, has irreparably distorted. In fact, «as no anarchy can long endure» Pampinea proposes that there be one among them in chief authority, honoured and obeyed by us as superior, whose exclusive care it shall be to devise how we may pass their time blithely<sup>27</sup>. To avoid discrimination, she suggests that «the weight and honour be borne by each one for a day; and let the first to bear sway be chosen by all them and let each holder of the signory be, for the time, sole arbiter of the place and manner in which they are to pass their time»<sup>28</sup>.

One last point must be dealt. Unlike positive law, natural law does not require the mediation of jurists: it is universal and immediately comprehensible to human reason. Therefore, the female figures of the *Decameron* often refer to natural law<sup>29</sup>. In the frame, Pampinea resorts to *ragione naturale* because the plague renders positive law null and the city of Florence finds itself in an exceptional situation; but also in the novellas, daughters and wives appeal to natural law to react against and defend themselves from the patriarchal ideology in place at the time.

In the *novelle*, natural law – which is so important to the constitution of the *brigata* at the frame level – is opposed to positive law<sup>30</sup>, which is in

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27 Boccaccio, *Decameron*, *Introduzione*, § 95, p. 28.

28 Ivi, § 96, p. 28.

29 This is the conclusion reached by SHERBERG (2011), pp. 40-41, who, however, suggests that the natural law corresponds to a patriarchal order and that Pampinea uses it to imitate a masculine principle: «Pampinea thus reveals herself versed in natural law theory; her own ideas extend from and capitalize on it as she envisions a new society for her friends. In assigning this role to a woman, Boccaccio executes a careful coup. The world of the brigata does not reject the predicates of the world of men; rather it affirms them. It is in her understanding of law and of the theory that subtends it that Pampinea realizes the full force of her leadership and becomes such a compelling figure. She does not lead the group outside of male structures; rather, she shows how they can now deploy previously established structures and principles to their own profit». I would add to Sherberg's argument that natural law from a medieval perspective not only provides a means of confirming existing structures, but also a non-institutional control measure against tyranny.

30 Boccaccio, *Decameron*, IV, 1, pp. 337-348. An example of this is the argument presented by the young widow Ghismonda (IV, 1). Once her jealous father, Tancredi, discovers her love for Guiscardo, he imprisons the young man, has him killed and gives orders that his heart be torn from his chest and handed over to his daughter. In a defense speech structured according to the legal model, Ghismonda tries to assert her own reasons: her

force in a given political/territorial context and space of time. Indeed, this is demonstrated by the short stories analyzed in this article: there is the case of the unfortunate Martellino (II, 1), who ends up on trial before the judge of the podestà, and whose friends have to resort to the will of an influential lord as the only way to remedy a proceeding that is just as illegitimate as the judge himself; and then there is the story of Madonna Filippa (VI, 7), which shows how her *bone eloquence* is enough to let her go unpunished, in a trial that should have found her guilty.

If Boccaccio's stories can conclude in this way, it is precisely because law and order is collapsing, even in ordinary situations where no catastrophic general conditions are seen.

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solitude forced her to follow the laws of nature in the only way that she could, by forming a secret relationship. Indeed, her natural desire to be a wife – and to once again experience the joys that being a wife implies – could not be satisfied legitimately because of her father's reluctance to find her a new husband. Ghismonda's defense is less provocative than that of Madonna Filippa in terms of the arguments used, but it is no less incisive in terms of oratory, and it clearly highlights these aspects: «Egli è il vero che io ho amato e amo Guiscardo, (...) ma a questo non m'indusse tanto la mia femminile fragilità, quanto la tua poca sollecitudine del maritarmi e la virtù di lui. Esser ti dovè, Tancredi, manifesto, essendo tu di carne, aver generata figliuola di carne e non di pietra o di ferro; e ricordar ti dovevi e dei, quantunque tu ora sie vecchio, chenti e quali e con che forza vengano le *leggi della giovinezza* (...). Sono adunque, sì come da te generata, di carne, e sì poco vivuta, che ancor son giovane, e per l'una cosa e per l'altra piena di concupiscibile disidero, al quale maravigliossime forze hanno date l'aver già, per essere stato maritata, conosciuto qual piacer sia a così fatto disidero dar compimento. Alle quali forze non potendo io resistere, a seguir quello a che elle mi tiravano, sì come giovane e femina, mi disposi e innamorami» (IV, 1, pp. 34-35). Moreover, Tancredi's daughter uses similar naturalistic arguments to counter the paternal accusations of having chosen, in her 'great madness', a 'young person of very poor condition'. According to her, all men are born equal, and only virtue can distinguish some of them and allow them to bear the title of 'nobles'; but practice subsequently overtook 'this law', making nobility a question related to descent and not to the value of an individual. The words of the young woman echoes the poetics of the *stilnovo*: nobility is of the soul and not of race, contrary to what can be deduced from *De amore* by Andrea Cappellano. Therefore, paternal law does not correspond to the law of nature and can therefore be rejected as illegitimate, as an expression of tyranny. ALMANZI (1974). For the self-defense of Ghismonda on the basis of natural law and Tancredi's reaction, see WEHLE (1993), spec. p. 236. For the standard opposition between *ingegno* and *natura*, which is embodied in the conflict between Tancredi and Ghismonda, see LEVENSTEIN (1996), spec. pp. 322 ss.



### 3. Boccaccio in the dock. Justice and process in *Decameron*

In the *Decameron* one can identify three orders of law, which perfectly reflects the tripartition at the base of medieval philosophy: divine law<sup>31</sup>, human law and natural law.

As far as human law is concerned, it should immediately be stated that, with the exception of the *casus* of Madonna Filippa, in no other novella does the subject of the laws and their application play a central role.

Though it is summarily and sparsely treated, the subject of the trial does appear in the first novella of the second day. It concerns Martellino<sup>32</sup>, a buffoon, who, with two other professional actors, Stecchi and Marchese, earns a living making the rounds of the various courts and entertaining audiences with impersonations. They arrive in Treviso on a day when a German, Arri-go, had died in odor of sanctity and all the sick people were crowding in the church in the hope of being cured by contact with the saint's body<sup>33</sup>. Being entire strangers to the place, and seeing everybody running to and from, they were quite astonished and curious to go see what was to be seen. They pretend to be crippled through the use of disguises in order to pilgrimage with the faithful and thus stage a fake healing at the end of the journey. The strategy works, and once inside, Martellino touches the body and makes it seem as if he has received the saint's miraculous healing; however, he is quickly exposed by a fellow Florentine. Fearing for Martellino's safety, his two friends contrive to have some law officers remove him from the clutches of the mob and haul him to the magistrate's place with the charge of stealing their purse. After torturing Martellino illegitimately<sup>34</sup>, the podestà's deputy decides to

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31 I cannot delve into divine law for reasons of space. However, there are relatively few references to the divine laws in the *Decameron*: see, e.g., I, 2, pp. 47-51; I, 3, pp. 52-55; II, 3, pp. 104-113; II, 7, pp. 151-175.

32 Boccaccio, *Decameron*, II, 1, pp. 90-95. On this *novella* see for instance: MAZZOTTA (1986), pp. 234-237; CONETTI (2015-2016), pp. 112-115; CAPPELLETTI (2017). Martellino also appears in the *novella* CXLIV of Franco Sacchetti's *Trecentonovelle*, pp. 379-386.

33 Thaumaturgy, from Greek θαῦμα, meaning 'miracle' and ἔργον, meaning 'work', is the capability of a magician or a saint to work magic or miracles: see CASTELLI, GERUZZI, SERRA (eds.) (2008). For the practice of the ritual in England and France, see BLOCH (1973).

34 The methods of application of torture are set carefully: its use was governed not only by *tractati* (see in this case: Alberto da Gandino, *Tractatus de maleficiis*, § *De quaestionibus et tormentis*, n. 2, p. 157; Guillaume Durand, *Speculum iuris*), but also by statutes: VALLERANI (2012), pp. 61 ss. The practice of torment has been the subject of many



call witnesses, on the suggestion of Martellino himself. The very same people who were beating him come to testify, and their testimony should surely be denied, as they are not trustworthy. Indeed, as Guillaume Durand recalls in *Speculum iudiciale*: «Quod est inimicus» is the first reason to reject a witness<sup>35</sup>. But there is more. These witnesses offer contrasting accounts about when the alleged crimes occurred, that is, the timeline they provide is inconsistent with their testimony. Despite this, the judge wants to convict Martellino only because he hates Florentines<sup>36</sup>. It is clear that we are faced with a case in which the abuse of the court's *arbitrium* reaches the highest level<sup>37</sup>, but it is ultimately subjugated to an even higher form of will: that of the lord of the place. Indeed, Marchese and Stecchi ask Sandro Agolanti for help, and he brings their plight to the attention of the lord. The lord then intercedes with the judge in favor of Martellino and saves him.

The legal process here is carried out much differently than in the case of Madonna Filippa, becoming not a moment of law enforcement, but rather an opportunity to distort the law and the principles of justice itself. The trial is summary, the evidence against the accused almost non-existent and the use of torture does not lead to a confession: nevertheless, the judge is still inclined to condemn Martellino and satisfy the angry mob.

This case provides a clear example of a concept that is repeated numerous times throughout the frame story: yes, laws are necessary, but it is also necessary to have people that enforce them judiciously<sup>38</sup>.

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in-depth studies in recent decades they highlighted the importance and the centrality of this instrument in the ancient process system regime. The bibliography on the subject is very wide. Without pretension of completeness, see SALVIOLI (1927), pp. 476-486; FIORELLI (1953-1954), *passim*; SBRICCOLI (2009); STORTI STORCHI (2002). For the Modern Age, see DEZZA (2001); MECCARELLI (2002); MASSETTO (2003); GARLATI (2011); CHIODI (2013); CHIODI (2014).

35 Guillaume Durand, *Speculum iuris*, 1.4 *De teste*, § 2, f. 285. On this point, see BASSANI (2017).

36 But, actually, see C.2.4.19.25: «Sciant cuncti accusatores eam se rem deferre debere in publicam notionem, quae munita sit testibus idoneis vel instructa apertissimis documentis vel indiciis ad probationem indubitatis et luce clarioribus expedita». For bibliography see ALESSI PALAZZOLO (1979), pp. 3-5; DEZZA (1989); DEZZA (2013), pp. 1-3.

37 For the *arbitrium iudicis in criminalibus*, see MECCARELLI (1998), pp. 195-254.

38 The crucial role played by those who hold the power to administer laws and justice is also reflected upon by Tedeldo degli Elisei (III, 7), who, returning to Florence, learns that his family believes he died at the hands of Aldobrandino Palermini, husband of his lover. In fact, he discovers that the corpse of a stranger was mistakenly believed to be

A different discussion on legislative and customary norms is offered by the seventh novella of the sixth day, whose heading summarizes the action, the process and its outcome as follows: «Madonna Filippa, being found by her husband with her lover, is cited before the court<sup>39</sup>, and by a ready and jocund answer acquits herself, and brings about an alteration of the statute»<sup>40</sup>. Even before introducing the characters, the narrator Filostrato polemically presents and criticizes the norm at the center of this case of adultery involving Madonna Filippa<sup>41</sup>. Indeed, Prato had a statute which dictated that any woman who was caught in the act of adultery should be burned alive, but her admission of guilt to the *podestà* was required<sup>42</sup>.

This was a harsh law for the 14<sup>th</sup> century. Although the penalties for adultery were generally severe in early medieval law, by the time in which Boccaccio was writing most legal systems did not require death for an adulteress<sup>43</sup>. The statutes varied considerably with regard to the choice of sanctions: an

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his own and, following a thorough investigation, the judges imprisoned and condemned Aldobrandino: «Per falsa suspizione accusato e con testimoni non veri averlo condotto a dover morire, e oltre a ciò la cieca severità delle leggi e de' rettori, li quali assai volte, quasi solleciti investigatori delli errori, incrudelendo fanno il falso provare, e sé ministri dicono della giustizia e di Dio, dove sono della iniquità e del diavolo esecutori», in Boccaccio, *Decameron*, III, 7, § 16, p. 278.

39 As also highlighted by GIANNETTO (2004), the *novella* repropose the exact dynamics of a real legal action. It should also be remembered that Giannetto demonstrates how the novella follows the pattern of a Senecian controversy, including in the order in which the characters speak: indeed, the *declamatio*, which is the real moment of the controversy, required «l'enunciazione della legge (*inscriptio legi*) e il *thema*, abbiamo dunque l'*accusa*, la *difesa dell'imputata*, l'*intervento di un testimone* (un accusatore-testimone che si trasforma in testimone a favore), il *giudizio* (quest'ultimo non sempre presente nelle controversie)» (pp. 96-97).

40 BESOMI (2004); BATTAGLIA RICCI (2007), pp. 76-77 and 80-83; BARSELLA (2009); KORNEEVA (2012); DÖERING (2014). For a contribution which is less focused on the legal implications of the novella, see MOROSINI (2000).

41 «Nella terra di Prato fu già uno statuto, nel ver non men biasimevole che aspro, il quale, senza niuna distinzione fare, comandava che così fosse arsa quella donna che dal marito fosse con alcun suo amante trovata in adulterio, come quella che per denari con qualunque altro uomo stata trovata fosse» in Boccaccio, *Decameron*, VI, 7, § 4, p. 530.

42 One cannot say whether such a law really existed because the statutes of Prato survived in a very fragmentary way. See LEE (1909), p. 179; PENNINGTON (1977), p. 902; KANNOVSKI (2008).

43 MARONGIU (1958).

adulteress ran the risk of death (in Milan, for example, by beheading), but usually lesser punishments were applied, including entry into a convent, the loss of her dowry or the payment of a fine<sup>44</sup>.

Filostrato criticizes the statutes of Prato, not only for their cruelty, but also for the fact that there is no distinction between adultery and prostitution<sup>45</sup>. The motivation of the action is ignored, with no difference being made between love – as in the case of Filippa – or the procurement of money.

Once the norm has been presented, Boccaccio proceeds to describe the case up until the accusation: Rinaldo de' Pugliesi discovers his wife in the arms of a lover, Lazzarino de' Guazzagliotri. Medieval law would have allowed Rinaldo to kill the lover and his wife if he acted immediately, but Boccaccio tells us that Rinaldo feared the consequences of precipitate action; why Rinaldo chose caution is not explained<sup>46</sup>. The next morning, though, he fearlessly obtains a summons which requires Madonna Filippa to answer the charge of

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44 It should be noted that similar provisions were provided for by various other municipal statutes: e.g. the statutes of Genoa (*Statuta et decreta communis Genuae*, f. 9<sup>r</sup>) and Ferrara (*Statuta urbis Ferrariae* 3.102, f. 153<sup>v</sup>). In secular law, the penalty for adultery was generally a monetary fine. See the Bolognese statutes of 1335 in TROMBETTI BUDRIESI (2008), VIII, 68, p. 694; DI RENZO VILLATA (1996). For a review of statutory legislation in the Middle Ages, see without pretension of completeness: STORTI STORCHI (2007), *passim*; STORTI STORCHI (2012); STORTI STORCHI (2009); finally, for an analysis of adultery with reference to *transactio* and *paces privatae*, see the pioneering work of PADOA SCHIOPPA (1976) and PADOA SCHIOPPA (1980); SBRICCOLI (1998); VALLERANI (1999); BELLABARBA (2001); again SBRICCOLI (2004); finally for an historiographical excursus during the early Middle Ages see LOSCHIAVO (2008).

45 Boccaccio, *Decameron*, VI, 7, § 4, p. 530.

46 The desire to kill his wife dates back to the Roman law from the Republican period according to which the husband could kill his wife if she was caught in the act of adultery. The *Lex Iulia de adulteriis coercendis* of Emperor Augustus made the killing of the adulterers dependent on different conditions: if the father caught his daughter in an adulterous act, he could kill her along with the lover, whatever his lineage or public office. The husband could only kill the lover and only in at the moment of adultery, while the father was not allowed to kill the lover without killing his daughter at the same time. The possibility of private revenge then entered into particular law and penitential literature. Canon law, on the other hand, prohibited taking justice into one's own hands: according to the *Corpus Iuris Canonici*, the husband who killed his adulterous wife was guilty of murder. See *Pauli sententiae, de adulteriis*, 2.26.14; Svetonio, *Vite dei Cesari*, Lib. II, *Augusto*, 67, 2; Tacito, *Annales*, 3, 24, 2; C. 9.9.29; I. 4.18.4. See BENNECKE (1884), p. 71; METTE-DITTMANN (1991), pp. 34-36 and 61-73; FAYER (2005), pp. 337-373.

adultery before the podestà<sup>47</sup>. Her family and relatives urge her to ignore the summons and to go into exile, but she refuses<sup>48</sup>.

The *podestà* is sympathetic to Madonna Filippa's plight. Boccaccio tells us that he is so impressed with her beauty and charm that he all but urges her to perjure herself. He carefully instructs her that if she does not confess, then he could not condemn her to death. However, she confesses her guilt unabashedly<sup>49</sup> and presents two arguments to the court which, surprisingly, result in an acquittal<sup>50</sup>.

She declares that the law could not apply to her because women in the past had not consented to this law, and they were not consulted when the

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47 «La qual cosa Rinaldo vedendo, turbato forte, appena dal correr loro addosso e di uccidergli si ritenne, e se non fosse che di sé medesimo dubitava, seguitando l'impeto della sua ira, l'avrebbe fatto. Ratterperatosi adunque da questo, non si poté temperare da voler quello dello statuto pratese, che a lui non era licito di fare, cioè la morte della sua donna. E per ciò, avendo al fallo della donna provare assai convenevole testimonianza, come il dì fu venuto, senza altro consiglio prendere, accusata la donna, la fece richiedere» in Boccaccio, *Decameron*, VI, 7, § 6-8, pp. 530-531.

48 In the *Gesta Romanorum* – VON OESTERLEY (1872), pp. 276-277 – under the title *Justum iudicium*, we read a 'short story' wherein the contours of Madonna Filippa's story are not hard to see: «Quidam imperator regnavit, qui statuit pro lege, quod si mulier sub viro adulterata esset, sine misericordia de alto monte precipitaretur. Accidit casus, quod quaedam mulier sub viro suo erat adulterata, statim secundum legem de alto monte fuit precipitata. Sed de monte tam suaviter descendit, quod in nullo lesa erat. Ducta est ad iudicium. Iudex videns, quod mortua non esset, sententiam dedit, iterum [de-beret] precipitari et mori. Ait mulier: Domine, si sic feceritis, contra legem agistis. Lex vult, quod nullus debet bis puniri pro uno delicto. Ego eram precipitata quia semel adulterata, et deus me miraculose salvavit, ergo iterato non debeo precipitari. Ait iudex: Satis prudenter respondisti. Vade in pace! Et salvata est mulier».

49 Filippa confesses to the adultery and justifies it by saying that it happened «for good and perfect love» which she felt for her lover. Such a concept from the lyrical tradition was opposed to the law of marriage. See the comment by Branca, which explains that «per buono e per perfetto amore» is to be read as an «[e]spressione della tradizione lirica e cavalleresca già ricorsa nel *Decameron* (III, 5, 21) e cui danno rilievo i quattro endecasillabi di seguito che avviano l'inizio baldanzoso della parlata di madonna Filippa (La donna [...] notte)».

50 BATTAGLIA RICCI (2007), pp. 81-82, underlines that Filippa uses arguments from the legal field: «Gli argomenti che madonna Filippa adduce per convincere il suo giudice, e dimostrare la legittimità dell'adulterio, non derivano infatti [...] dai manuali di quell'amore cortese che non pare del tutto estraneo al "buono e perfetto amore" (§ 3) che stringe la "gentil e bella e oltre a ogni altra innamorata" (§ 5) madonna Filippa al "gentile uomo che più che sé la ama" (§ 17) [...], ma derivano dalla tradizione del dibattito forense».

statute was first made<sup>51</sup>. Consequently, it was bad law. Laws, she said, must have the consent of those who are affected by them. She tells the *podestà* that her argument would be familiar to him, and, indeed, it should have been. Although Madonna Filippa's situation is outlandish, her argument is a common staple of medieval thought. She uses a legal clause of canon law that Boniface VIII had recorded as *regula iuris* general in the *Liber Sextus* in 1298: «Quod omnes tangit debet ab omnibus approbari»<sup>52</sup>. Filippa claims that the statute mentioned by her husband and by the *podestà* is not legally stipulated and therefore is not valid. The law should be called «bad law» because no woman has ever been called to give her consent<sup>53</sup>.

However, Madonna Filippa was not satisfied to let the matter stand with only one argument. She next asks her husband whether she had ever denied him her body, and he admits that she has been a compliant wife. She then retorts: «What am I to do with the surplus? Throw it to the dogs?»<sup>54</sup> Far

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51 The implicit quote of Madonna Filippa returns to a famous text of Roman Law, that it contains the definition of Papinian's legal norm: «Lex est commune praeceptum, virorum prudentium consultum, delictorum quae sponte vel ignorantia contrahuntur coercitio, communis rei publicae sponsio» (D.1.3.1).

52 Bonifacius VIII, *Liber VI*, tit. *De regulis iuris*, *Regula XXIX*, col. 1122. *Contra Conetti, Il collasso dell'ordine giuridico medievale e il diritto naturale nel Decameron*, p. 117. For a brief discussion of the maxim and its origins and importance in medieval thought, see KANNOVSKI (2008), p. 53; PENNINGTON (1970); HALL (1972), spec. pp. 131-132; once again, PENNINGTON (1977), pp. 903-904.

53 In the Middle Ages it was very difficult, if not impossible at all, to argue that women were members at all the effects of the municipality and therefore that their consent was necessary to confer to the municipal law the *status* of legal norm. With regard to this thought, Madonna Filippa also comes into conflict with Cino da Pistoia, who, commenting on D.1.3.1, states that «Argue etiam ex hoc, quod dicit, videtur quod in lege condenda non debent adhiberi mulieres: quia hoc dicit, virorum prudentium. Et ex hoc inducitur, quod consensus mulierum non inducit consuetudinem, quod est ius». Cino denies that women's participation in the legislative phase is admissible. It also denies that women's behavior can be implemented a customary norm, and therefore, with implicit specularity, that they can induce to the desuetudine. Cynus Pistoriensis, *In codicem et aliquot titulos primi pandectorum tomī, id est, digesti veteris doctissima commentaria*, II, comm. ad D.1.3.1, f. 7<sup>r</sup>.

54 The allusion to Matthew 7.6 underlined the relationship of Boccaccio's alimential and sexual-excess metaphor and gave Madonna Filippa's second argument a parodical justification; Boccaccio may have even known that 'sacrum' was sometimes a euphemism for a woman's body. The story, then, derives its humor from Boccaccio's parody of a legal maxim and of a biblical quotation, and these two subtle allusions give substance to a tale which might otherwise appear to be a shallow piece of wit.

better, she continues, to bestow it on her lover than to let it spoil or go to waste<sup>55</sup>.

Filippa is therefore able to turn the plaintiff into his own witness. Furthermore, her question reveals how the law considers marriage: as a contract involving the body and sexuality of the husband<sup>56</sup>. If a marriage is reduced to satisfying sexual obligations, Filippa has respected her part of the contract.

Madonna Filippa's very pointed speech meets the approval of the citizens of Prato. That they change the law on the spot is a stroke of good fortune for the accused, but it also highlights the arbitrary nature of the statutes<sup>57</sup>, which are nothing more than social conventions negotiable through skillful rhetoric. The outcome of the judgment is clearly unfair and paradoxical both on the formal and on the substantive level. On a formal level, a rule that could have been avoided was to be applied immediately; on a substantive level, an adulteress caught in the act, and therefore subject to some sort of punishment – if not under statutory law than at least under common Roman law – was absolved of her crime. Boccaccio presents the amused reaction of the people: everyone laughs because the law has been mocked. By attacking the logical elements of the legal system in her proceedings, Madonna Filippa manages to be in the right: she succeeds in mocking the system from within. Thus, the relativity of law is on full display: it is enough to be witty and specious like Filippa for those in the wrong to be found in the right.

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55 «Che voi mio marito domandiate se io ogni volta, e quante volte a lui piaceva, senza dir mai di no, io di me stessa gli concedeva intera copia o no [...] domando io, messer podestà, se egli ha sempre di me preso quello che gli è bisognato e piaciuto, io che doveva fare o debbo di quel che gli avanza? Debbolo io gittare ai cani? Non è egli molto meglio servirne un gentile uomo che più che sé m'ama, che lasciarlo perdere o guastare?» in Boccaccio, *Decameron*, VI, 7, p. 532.

56 BARSELLA (2009), p. 19 also highlights the contractual logic of the statute: «La domanda (di Filippa) fa deviare il dibattito su un piano che mette a nudo la logica ultima che regge lo statuto, una logica che – come ha rilevato Giuseppe Mazzotta – considera non solo il corpo ma l'astratto campo della sessualità alla stregua di una merce su cui si può imporre un diritto di proprietà o di possesso, e che al pari di ogni merce sottostà alle leggi della quantificazione, dell'utile e del consumo».

57 Such is the conclusion of MAZZOTTA (1986), p. 231: «Filippa, in short, manages to turn her trial into a judgment of the law that should have judged her and forces its revision. The change her argument causes implies that laws are arbitrary conventions and that there is no necessary and immutable relation between *nomos* and *physis*». Moreover, the novella even alludes to the flexibility of the statutes. See CHITTOLINI (1997). See also the essays published in the volume of KELLER-BUSCH (1991).

#### 4. Conclusion

The analysis of these novellas makes it possible to draw the first conclusions on the relationship between law and literature in Boccaccio's masterpiece. First of all, it can be seen that from the reading of the *Decameron* does not emerge a sort of analytic overview of the principles and operations of the law that punctuate the fourth book of John of Salisbury's *Policraticus*<sup>58</sup>, where the provisions of the *Corpus Iuris Civilis* and those of *Deuteronomy* are combined with the aim of producing an elaborate theory of statecraft, nor can we expect something like Dante's iconography of justice<sup>59</sup>. Boccaccio goes to the core of legal thought, to the source of legal and moral authority, which both canonists and theologians posit as *Lex naturae*. He even dramatizes tensions in the concept of the law, which simultaneously appears as both ethical and rethorical issue.

Furthermore, the examination serves to highlight what is probably a narrative device employed by Boccaccio; just as the disappearance of law and order is fully revealed in a catastrophe such as that of the plague, so too is it present, albeit under the surface, in everyday life. To the readers of the *Decameron*, the daily breakdowns in the legal order seem to be hidden within the progress of the story, wherein they actually play a positive role overall. These dysfunctions show the contradictions and fragility of the legal system, which emerges as soon as we compare the narratives with contemporary contexts, with legal practice, with statutes, with procedural law and with science law. Likewise, for brigata, an exceptional situation such as the plague was needed to understand how the legal order was in fact constantly being circumvented.

The captivating rhythm of the narrative and the sympathy aroused in the reader by the protagonists of the stories should not obscure the objective

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58 See i.e. GRELLARD, LACHAUD (2014), 1-30 and SASSIER (2014), pp. 235-257.

59 Dante's work and thought clearly operated within a legal framework. The centrality of law is seen above all in the *Divine Comedy*: Dante imagines the afterlife as a highly regulated administrative structure, endowed with a complex network of local laws, hierarchical jurisdictions, well-calculated punishments and rewards. More than the citations of legal texts, which are however present in the work, are these forms of the right to express the poet's position towards the law and justice. On Dante and justice see the works of GILBERT (1925); CASSELL (1984); MAZZOTTA (1993); DI FONZO (2007); FERRARA (2012); GROSSVOGEL (2012); STEINBERG (2013). For Dante's interventions in the legal conflicts between the Church and the Empire, see MACCARRONE (1951); TILL DAVIS (1957).



message that the narration itself conveys. There are stories that today would be labeled, in common language, as ‘judicial errors’. If the law worked, Martellino - accused by false witnesses and subject to the illegitimate persecution of the court - would be acquitted without any need of help from high-ranking people. It is evident in *novella* II, 1 (but also in others) that law and order disappeared silently from everyday reality<sup>60</sup>.

Nonetheless, more than any other novella, it is *novella* VI, 7 which best represents Boccaccio’s knowledge of law and his critical eye towards legal issues.

Contrary to natural law, which is immutable and directly visible to reason, positive law requires creation, interpretation and application. In this novella, the weaknesses of positive law are made visible in a playful and entertaining way. With Madonna Filippa, Boccaccio creates a transgressive character (historically quite improbable) who has a provocative attitude towards law from a position outside the legal system. As a woman, she is excluded from the legislative procedure, but thanks to her courtly virtues, her exceptional capacity for feeling and her *bone eloquence*, she belongs to a literary space from which she can question the rules of positive law. With the final success of Madonna Filippa, poetic order prevails over legal order. In its reading of a legal *casus*, the *novella* does nothing but reiterate the importance of laws in the *Decameron*. Although there are no other short stories that, like this one, reveal Boccaccio’s interests in legal matters, their infractions and, consequently, the judicial risks resulting from them, it is undeniable that the role of laws is fundamental both in relation to the corpus of the novellas and – perhaps even more so – as regards the frame story.

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60 If one compares what is described in the novellas with the treaties or the statutes of the penal law, it is clear that the historical reality was different. See STEINBERG (2017).



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INSTITUTIONS AND CRIMINAL PROCEDURE OF THE MAGDEBURG  
LAW IN POLAND ACCORDING TO *JUDAS' SACK*  
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Sebastian Fabian Klonowic is one of the Polish writers of the turn of the Renaissance and Baroque who is hardly known even in Poland. Moreover, not until recently have the new studies revealed many details of his life<sup>1</sup>, disproving many myths and statements unsupported by primary sources. However, there are still periods of Klonowic's life that are little known, especially his education and youth.

Klonowic was born in Sulmierzyce, in Poznań Voivodeship in 1545<sup>2</sup>. It is unknown where he received an education: all hypotheses (also these about his learning in the Benedictine monastery or studies at the University of Cracow) are based on more or less probable conjectures<sup>3</sup>. It is undeniable, however, that he did not get an academic degree, although he acquired a thorough knowledge in a wide range of fields<sup>4</sup>, including the Bible and ancient authors, to whom he referred in his literary output. For example, in *Judas's Sack*<sup>5</sup> Klonowic mentioned Apuleius, Aristotle, Horace, Livy, Martial, Terence and Virgil. The author was also well-versed in Greek and Roman mythology as well as provisions of the Law of the Twelve Tables. In the abovementioned work, Klonowic recalled his stay in Pezinok in Hungary (modern Slovakia) in 1560<sup>6</sup> and Český Krumlov in Moravia (modern Czech Republic)<sup>7</sup> ten years later; however, the reason for Klonowic's stay in the Habsburg lands remains undetermined<sup>8</sup>.

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1 WIŚNIEWSKA (2006); WIŚNIEWSKA (2010).

2 WIŚNIEWSKA (2006), pp. 11-12, also a biography by NADOLSKI (1967-1968), p. 4.

3 WIŚNIEWSKA (2006), pp. 13-14, NADOLSKI (1967-1968), p. 4.

4 Discussed by WIŚNIEWSKA (2006), pp. 14-16.

5 For the purpose of the article we are using the critical edition: KLONOWIC (1960) (hereinafter: *Judas's Sack*).

6 See *ibidem*, p. 142, v. 31.

7 See *ibidem*, pp. 113-114.

8 WIŚNIEWSKA (2006) p. 14, NADOLSKI (1967-1968), p. 4. In *Judas's Sack* Klonowic

For the most of his life Klonowic lived in Lublin, where he arrived in 1570 and, climbing the career ladder, he gained experience in the urban chancery. Finally, he became a councillor in 1594 (it was a lifetime post at that time) and for the first time the mayor<sup>9</sup>. The choice of Lublin was probably driven by the presence of his relatives and friends from Sulmierzyce there. Most likely, Klonowic was not a member of the Minor Reformed Church of Poland that was formed in Lublin at that time, as the preserved sources do not list him as a member of any of Protestant congregations, nor allow for determining any direct contacts with dissidents<sup>10</sup>. Also assumptions as to his sympathizing with Protestants or Arians<sup>11</sup> seem baseless since for several years he governed in Psary village belonging to the Benedictine monastery in Sieciechów<sup>12</sup>; what

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wrote a few Bohemian words together with their translations on margins – see *ibidem*, pp. 114, 153, 185 and 186; WIŚNIEWSKA (2006), p. 155.

9 *Ibidem*, pp. 75-77. The position of a councillor in Lublin was lifelong, whereas the elected mayor was a governor for a trimester (Klonowic was re-elected four times). There were differentiated urban electoral systems in individual towns of the Polish-Lithuanian Commonwealth, although in large and medium urban centres the lifelong town councils were rather typical – as a rule, the members of the council were the wealthiest burghers. The councils usually recruited new members by cooptation. See BOGUĆKA, SAMSONOWICZ (1986), pp. 454-457.

10 See Wiśniewska (2006), pp. 17-18 and 93-94. It does not necessarily mean that he did not have any contacts with them – the majority of his works, including *Judas's Sack* was printed in Arian printing houses. In the Dedication of *Judas's Sack* the author declared that God became a man by the Annunciation to the Virgin Mary, which inclines us to reject the assumptions as to Klonowic's Arianism – see *Judas's Sack*, p. 65.

11 Expressed for example in POLLAK (1964), p. 321.

12 As the vogt of the monastery village, Psary, Klonowic appears in the town books of Lublin for the first time on February 3, 1589, although already in 1583 he was mentioned among the witnesses in the privilege of Józef Wereszczyński, the Kievan Bishop and the abbot of the monastery in Sieciechów, for the monastery town Sieciechów – see WIŚNIEWSKA (2006), pp. 44 and 46. It is noteworthy that Klonowic cooperated with the bishop also in the field of literature – between 1587 and 1588 he wrote a poem in memorial of the Chełm chapter, which was posted in the collection of sermons of the bishop. He also translated into Latin bishop's two speeches from the interregnum period, as well as the characterization of the virtues of an ideal monarch addressed to the newly elected King Sigismund III Vasa – *ibidem*, pp. 51-54. Furthermore, in 1597 he published in print the Polish translation of *The Rule of Saint Benedict* dedicated to the Kievan Bishop, whereas in 1602 there was published another literary work honouring the Archbishop of Lviv, Jan Dymitr Solikowski, who was made the abbot of the monastery in Sieciechów after Wereszczyński deceased in 1597 – *ibidem*, pp. 95-96 and 103. As a reward for the work for the monastery, in 1588

is more, he was buried in Lublin parish church. Besides, in *Judas's Sack* he clearly stood out among the Catholic Church's critics, commanding the bishops and educated clergy to eradicate numerous abuses in religious practices committed by cheaters and take-ins<sup>13</sup>. Thanks to his work in the chancery, Klonowic could get acquainted with the Magdeburg Law applicable in Lublin (as well as many other towns of the Polish-Lithuanian Commonwealth). His education and abilities provided him with financial and family stability: in 1580 he married a daughter of a recently deceased Lublin alderman, a sixteen years old Agnieszka, whereby he became an occupier of a tenement house in the market square<sup>14</sup>. Two years later he received the citizenship of Lublin<sup>15</sup>. Klonowic died on 29<sup>th</sup> August of 1602 and was buried in the crypt of the councillors in the Lublin parish church<sup>16</sup>.

Klonowic was given the opportunity to demonstrate his knowledge of the law in other, quite surprising circumstances: on 15<sup>th</sup> December of 1593, serving as the vogt, he was accused by the Lublin burgher of assault and wounding at night, including the mutilation of an eye. The defendant indicated that he

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Klonowic received – apart from the voigtship in Psary – also nearly 10 Lublin lans of monastery land on lease with the right to found a new village, Wólka Józefowska, and additionally one thousand Hungarian forints for a start-up. It is worth to emphasize that this grant covered also Klonowic's heirs and ceased with the moment when the abovementioned sum was returned by the abbey – see *ibidem*, pp. 58-59. As a vogt of Psary, Klonowic appeared in 1600, after his benefactor, bishop and abbot Wereszczyński's death – see the date of Dedication of *Judas's Sack* – *Judas's Sack*, p. 70; WIŚNIEWSKA (2006), pp. 82-83.

13 See *Judas's Sack*, p. 174, vv. 31-36. Apart from that, Klonowic indicated that while a sacrilegist is breaking into the tabernacle, he steals both the silver and the sacrament; he also warns dissidents against the plunder of church equipment bequeathed in wills to God, and he urged pilgrims to visit graves of saints – see *ibidem*, p. 98, vv. 30-31; p. 102, vv. 23-28; p. 186, vv. 11-12.

14 WIŚNIEWSKA (2006), pp. 24-25 and 28. Simultaneously after Wiślicki's death, Klonowic got involved in the dispute with his widow and sister over the estate of the deceased. The dispute which lasted until Klonowic's death (his wife was a co-owner of the tenement house, Klonowic represented her in town courts) sometimes involved the acts of violence – the mother beat her daughter (Klonowic's wife), then she was beaten by Klonowic, who was obliged to pay compensatory damages and serve a prison sentence – see *ibidem*, pp. 57-58 nad 68.

15 *Ibidem*, p. 28. He married his only daughter off to a goldsmith, Szymon Lwowczyk, which proved his high social status – see *ibidem*, p. 89.

16 *Ibidem*, p. 105. Lublin parish church of St. Nicholas was disassembled in the middle of the 19<sup>th</sup> century. due to poor technical condition.

had been attacked by the prosecutor, who lost his eye to his own intemperance in eating and drinking. The council court, considering the justifying circumstances of self-defence, absolved Klonowic from the payment of the compensatory damages, although he was obliged to make a solemn oath during the first court proceedings after the Epiphany to confirm his testimony. The judgment was accepted by the parties, but only Klonowic appeared on the set date – on 12<sup>th</sup> January of 1594 – whereby he was released from the obligation to take an oath in the presence of the prosecutor<sup>17</sup>.

Another case deals with the unfaithfulness of Agnieszka, Klonowic's wife<sup>18</sup>. Firstly, on 4<sup>th</sup> December of 1596, Klonowic informed the town council that his wife had broken the marriage vows by demonstrating the lack of respect for the marriage bed and committing an act of adultery. The council reprimanded Agnieszka, forbidding her any immoral behaviour under severe penalties<sup>19</sup>. Subsequently, on 14<sup>th</sup> December of 1596, Klonowic accused Melchior Złotniczek, who had been detained in the urban prison, of adultery with his wife. Melchior pleaded guilty to two acts of sexual intercourse with Agnieszka, who also lent him sixty zloty; when Klonowic came back home, Agnieszka told Melchior to hide under the bed. However, her husband noticed a dagger of an uninvited guest. In response Melchior fired at him with a gun. Złotniczek was escorted to the prison, and from that moment his whereabouts remain unknown. It seems that Agnieszka did not bear severe consequences after all<sup>20</sup>.

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17 The State Archive in Lublin, Akta miasta Lublina, ref. no. 155, fol. 19v-20, 29. H. Wiśniewska mistakenly indicated that the court obliged Klonowic to pay the compensatory damages and deprived him of the opportunity to appeal against this decision – see WIŚNIEWSKA (2006), pp. 72-73 and 78. Mind also the examples of other fights between clerks and Lublin patricians which clearly illustrate that Klonowic's case was not unique – pp. 78-79.

18 WIŚNIEWSKA (2006), pp. 83-85 (mind minor inaccuracies in the description of the entries from the town books).

19 The State Archive in Lublin, Akta miasta Lublina, ref. no. 155, fol. 573v.

20 The Magdeburg Law, in article 13 of the Second Book of *Speculum Saxonum*, provided for capital punishment for adultery. This provision was referred to by Polish authors of the second half of the 16<sup>th</sup> century – GROICKI, KORANYI, SAWICKI, ORLOWSKA (1954), p. 206; SZCZERBIC (2016), 1, p. 70. The judicial practice in the Kingdom of Poland was more lenient, as the penalty of banishment from the town, flogging, fines or church penance were used quite frequently (depending on the circumstances of every such case, which, moreover, were not always clearly presented in the court books) – see e.g. GŁOWACKA-PENCZYŃSKA (2010), pp. 36-37 and 132-137; URUSZCZAK (2005), pp. 9-17; KAMLER (2010), pp. 285, 398-401 and 403-404. Of particular importance for the measure of penalty was especially

Klonowic brought three more witnesses to the trial who generally confirmed his testimony<sup>21</sup>. Undoubtedly, we must agree with Hanna Wiśniewska and her explanation of the reason why Klonowic attacked adulterers particularly aggressively in *Judas's Sack*<sup>22</sup>.

Klonowic's rich literary output is interwoven with educational purpose that comes down to show the righteous, decent and honest way of living<sup>23</sup>. In the narrative poem of our interest (considered to be the best of Klonowic's works)<sup>24</sup>, published in print in 1600, the author clearly stated his aim in the Dedication and Preface: he wanted to encourage people, especially youth<sup>25</sup>, to improve their habits<sup>26</sup>, indicating that it is the bad parenting that may be the cause of one becoming a thief<sup>27</sup>. A moralizing poem was dedicated to the issue of the covetousness of someone's goods, leading to all kinds of frauds and injustice in acquiring property. The author distinguished four such kinds of mischief, presenting the eponymous Judas's sack as composed of four pieces of leather<sup>28</sup>. The first category are secret frauds carried out in a wolfish manner. Apart from thieves one can also notice there sacrilegists, human traffickers and public treasury thieves<sup>29</sup>. The fox leather – and second category – comprises all types of flatterers and scammers. The third part of the poem

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the marital status of an adulterer. Klonowic's witnesses testified that Melchior, unlike Agnieszka, was unmarried. The latter, however, could have been punished – if at all – corporally or financially, as she lived in Lublin afterwards.

21 The State Archive in Lublin, Akta miasta Lublina, ref. no. 155, fol. 577v-578. Anyhow, the events did not affect Agnieszka's fate (and reputation), who after the death of her husband, probably as a wealthy widow, married a merchant from Gdańsk, Paweł Grikonen: WIŚNIEWSKA (2006), pp. 92 and 106.

22 *Ibidem*, p. 85.

23 *Ibidem*, p. 131 and particularly pp. 158-159.

24 *Ibidem*, p. 245.

25 *Ibidem*, pp. 159 and 218.

26 *Judas's Sack*, p. 62 and 70. Cf. WIŚNIEWSKA (2006), pp. 102-103.

27 *Judas's Sack*, p. 97, vv. 13-20, including the proverb in verse 19: «Bo kto z łotry przestawa, łotrem także bywa» [Who keeps company with evildoers, will do evil] – this form of the proverb is the oldest that one can find in primary sources (see *Nowa księga przysłów*, p. 349). This is another version of a very common proverb: «Z jakim przestajesz, takim się stajesz» [Who keeps company with wolves, will learn to howl. This is the English version of this proverb], which appeared in sources from 1597 – see *ibidem*, pp. 1108-1109.

28 See the description in the Dedication of *Judas's Sack*, p. 62, also in the *Preface* – pp. 74 and 77.

29 The detailed list in *Judas's Sack*, p. 98, vv. 2-14.

discussed wrongdoers who operate under the guise of the law, compared to lynxes by the author. The fourth group, which is lions, reach their goals with the use of violence and coercion, who were not described due to the fear their actions arouse.

Klonowic saw 'Judases' in many places: «In homes and hospitals / churches, town halls and princely rooms!»<sup>30</sup>; in this manner, he characterized numerous people, social conditions and professions. In this essay we shall only discuss the image of institutions and procedures of the criminal law presented in the poem. We cannot help but emphasize the great significance of the descriptions of all kinds of wrongdoers, their professional careers and indecent practices<sup>31</sup> for the purpose of illustrating the criminality in the former Polish-Lithuanian Commonwealth. The poem is also a valuable source for the study of mores of the epoch.

In the first and the most extensive part of the poem, Klonowic discussed a few definitions. He described theft not as an act of taking away of a movable property without the knowledge and consent of its owner, but also, in accordance with Roman law, as all acts of fraudulent handling (*fraudulosa contrectatio*) of a thing, which comprises the theft of the right to use and possess it<sup>32</sup>. Subsequently, Klonowic presented in details individual categories of thieves, referring to the examples known from Roman history, such as *fetiales* or acts *de ambitu* and *de repetundis*<sup>33</sup>. In reference to the article 121 of the *Ius Mu-*

30 *Judas's Sack*, p. 78, v. 11-12 of the *Preface*.

31 *Inter alia*, he indicated Gypsies as dealing with thievery and witchcraft (*Judas's Sack*, pp. 93-94 and 97), Jews as dealing with usury (p. 233, vv. 1-4, p. 237, vv. 21-24 and the margin note; he accused them also of ritual murders and host desecration – *ibidem*, p. 138, vv. 1-14), which was not uncommon in those days; Klonowic described also Tatars attacking towns and villages in order to abduct people and their belongings as an example of misfortune of the south-eastern territories of the Commonwealth (*ibidem*, p. 138, 141-142) – see WIŚNIEWSKA (2006), pp. 133-136.

32 See *Judas's Sack*, p. 86 and the commentary on pp. 257-258. On the margin Klonowic referred to *Corpus iuris civilis*, specifically I. 4, 1, 1, his definition is also in compliance with D. 47, 2, 1, 3 – see *ibidem*, p. 258. However, he broadened the scope and recognized as thieves also those who, by destroying the border signs, unlawfully moved the boundaries between properties – *ibidem*, p. 89. The definition from I. 4, 1, 1: «Furtum est contrectatio rei fraudulosa vel ipsius rei vel etiam usus eius possessionisve, quod lege naturali prohibitum est admittre»; por. także I. 4, 1, 6: «Furtum autem fit non solum, cum quis interciipiendi causa rem alienam amovet, sed generaliter cum quis alienam rem invite domino contractat». See: *Corpus iuris civilis*, p. 43.

33 *Judas's Sack*, p. 141, vv. 16-18 (Klonowic described the Tatars as robbers and

*nicipale* dealing with the swarm of bees (in the Magdeburg Law recognized as wild animals), he indicated that an animal at large ceases to be the property of the existing owner<sup>34</sup>. Above all, however, in this part Klonowic included an interesting description of the fate of a captured thief.

It was preceded by a lengthy preachy argument, in which Klonowic admonished that the reason behind the wretched fate of thieves was the desire of young men to spend days in idleness and hedonism this invariably lead to poverty, which inclined them to stealing<sup>35</sup>. Thieves' fate was sorrowful – a juvenile captured for the first time was punished by flogging, for the second – by another corporal punishment<sup>36</sup>, but captured for the third time a thief was hanged (this was a basic punishment in accordance with the article 13 of the Second Book of the *Sachsenspiegel* referred to by Klonowic)<sup>37</sup>. Beforehand, however, such a culprit was imprisoned, often put in stocks, where he was interrogated by a vogt and aldermen<sup>38</sup> followed by a hangman. Klonowic described the conduct of investigation, indicating the formulaic questions about name and ancestry of the defendant and his parents<sup>39</sup>; then, in case of no voluntary testimony, rather unsophisticated torture methods. These, far from being technically advanced, consisted in the use of racks and burning with

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plunderers which did not know the institutions of the law of war; in this context he pointed to Roman institutions as example of honest going to war); p. 113, vv. 1-2; p. 117, vv. 21-22.

34 *Ibidem*, p. 130, vv. 15-20 and the margin note and commentary on p. 271. Article 121 *Ius Municipale*: see JASKIER (1535a), fol. 58v; SZCZERBIC (2011), p. 259.

35 *Judas's Sack*, pp. 146, 149-150 and 153.

36 *Ibidem*, p. 154, vv. 29-36 and p. 157, vv. 1-2. The Magdeburg Law, referring to Roman law, punished an underage thief more leniently – see *ibidem*, the commentary on p. 277-278 and the gloss to the article 13 of the Second Book of *Speculum Saxonum* in the Latin translation by Mikołaj Jaskier: see JASKIER (1535b), fol. 61; in the fragment marked as originating from the Law of the Twelve Tables), also e.g. SZCZERBIC (2016), 2, p. 139 (with a reference to the gloss to the article 38 *Ius Municipale* and article 3 of the Third Book of *Speculum Saxonum*).

37 See e.g. SZCZERBIC (2016), 2, p. 589 or GROICKI, KORANYI, SAWICKI, ORLOWSKA (1953), pp. 201-202. The most recent scientific work on the subject is the study by KAMLER (2010), pp. 357-362 (charts), 363-379 and 415, whose findings indicate that the application of the death penalty was common (generally by hanging) in the cases of theft of a valuable item, whereas the flogging and banishment were meted out for minor thefts.

38 It is worth to remember that Klonowic for more than six years (1583-1589) was an alderman, whereas between 1592 and 1593 he was a vogt in Lublin.

39 In accordance with a settled custom such questions were asked at the beginning of the interrogation – see MIKOŁAJCZYK (2013), pp. 250-255.



candles, which, according to the poem, always ended effectively<sup>40</sup>. It is especially significant considering that Klonowic was an alderman and vogt in one of the largest towns of the Kingdom of Poland. The next day the culprit would be brought to the courtroom so that he could repeat his testimony extracted under torture. If reluctant, he could be submitted to torture again<sup>41</sup>. Klonowic indeed admitted that a tortured defendant would confess every crime<sup>42</sup>, although he seemed not to notice any problems underlying this means of obtaining testimonies, neither the possibility of abuses, nor false confessions. It is probable, however, that it is due to the purpose of *Judas's Sack* that the author did not decide to include his doubts regarding such matters. As a result, it cannot be definitely stated whether Klonowic discerned the problems associated to tortures (which had been acknowledged fifty years earlier in Groicki's legal works)<sup>43</sup>.

Thereafter the author quoted the phrases uttered by the hangman after torture, who informed the vogt's court about the guilt of the defendant, and announced his execution by hanging outside the town<sup>44</sup>. The phrases are important for the history of the criminal process, as indeed such a procedure was performed<sup>45</sup>. Klonowic might have used authentic formulas uttered by

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40 *Judas's Sack*, p. 157, vv. 3-36 and p. 158, vv. 1-14. The tortures practiced in Polish towns were described by Kamler (2010), pp. 313-343. The author drew attention to the strong dominance of thieves in the groups of tortured people and the small diversity of types of torture (stretching and burning alive; anyway, such information are rare in town books) – *ibidem*, accordingly pp. 325 and 328. Also MIKOŁAJCZYK (2013), pp. 309-313, indicated that other types of torture were exceptional, adding that stretching and roasting could occur in different configurations in specific cases.

41 *Judas's Sack*, p. 158, v. 15-22. Indeed, the recanting of forced testimony was one of the reasons for the repetition of tortures – see MIKOŁAJCZYK (2013), pp. 319-322.

42 The high effectiveness of torture and the considerable credibility of forced testimonies are confirmed by the modern researchers as W. Maisel and M. Kamler; MIKOŁAJCZYK (2013), pp. 322-323, agreed with their opinion.

43 See e.g. GROICKI, KORANYI, SAWICKI, ORLOWSKA (1953), pp. 191 and 195-196 or GROICKI (1954), pp. 105-108 (article 4 of the remake of *Constitutio Criminalis Carolina* by Groicki). In the modern scientific literature see e.g. MIKOŁAJCZYK (2013), pp. 289-290.

44 *Judas's Sack*, p. 158, vv. 27-36. M. Kamler indicated that the Cracow town book of 1589 contains very similar formulas, see *idem*, *Złoczyńcy*, p. 416. These two examples from 1589 in combination with the fragment we are interested in in *Judas's Sack* are referred to by MIKOŁAJCZYK (2013), pp. 464-465, which indicates that these are the only known examples of judges refusing to send the convict to the death row.

45 See the commentary to the fragment – *Judas's Sack*, p. 280.



hangmen. Furthermore, the court instructed the hangman to execute the sentence in accordance with the law as well as to abstain from transgressing the customary mode of conduct<sup>46</sup>, which in all likelihood was practiced by the judiciary (at least in Lublin). Another custom that followed the court's order (which was supposed to stop the hangman from tormenting the convict against the law), known from Klonowic's poem, is a request for forgiveness addressed by the hangman to the convict in the presence of the court. Its aim was to remind the wrongdoer that it was his own crime that led to his conviction<sup>47</sup>. Naturally, Klonowic finished the story of a poor convict in compliance with the abovementioned art. 13 of the second book of the *Sachsenspiegel*: with a macabre description of hanging and leaving the body to birds. Immediately after this, he adopted again the didactic tone and called for the honest performance of duties, taking care of a good name, moderation and avoidance of idleness<sup>48</sup>. A noteworthy remark is included at the end of first part of the poem. Klonowic deemed it impossible to acquire the ownership of a stolen property, as it was provided in the *Law of the Twelve Tables* and the art. 36 of the second book of the *Sachsenspiegel*<sup>49</sup>.

The second part, dedicated to foxes, or frauds, is devoid of descriptions of institutions of the criminal trial. Instead, it viciously criticizes adulterers and unfaithful wives who support them (also financially)<sup>50</sup>. Klonowic took up the legal issues again in the third part, dedicated to lynxes, or those who steal under the guise of the law. This part, however, comprises the critique of the misuse of the civil law institutions. First, Klonowic criticized the representatives of the parties for their advocacy of unjust cases; then he proceeded to attacking usurers and unreliable debtors<sup>51</sup> (what is interesting, in 1593 Klonowic avoided appearing in the Lublin council court when sued by missionaries of the Lublin parish church for outstanding rent due for the repurchase of the

46 *Ibidem*, p. 161, vv. 2-3.

47 *Ibidem*, p. 161, vv. 5-8; cf. the commentary on p. 280. MIKOŁAJCZYK (2013), p. 553, indicated that he cannot comment on the scale of the phenomenon.

48 *Judas's Sack*, p. 161, vv. 29-36.

49 *Ibidem*, p. 169, vv. 9-12 and the margin note; JASKIER (1535b), fol. 77-77v. Cf. GROICKI (1954), p. 43 (with a reference to that article).

50 *Judas's Sack*, p. 197-198, 201-202, 205-206. It is pointed out that Klonowic's literary output is dominated by negative images of women from the ancient history and mythology, with the emphasis on their treacherous tendencies – also always in *Judas's Sack* – WIŚNIEWSKA (2006), pp. 137 and also 250-252.

51 *Judas's Sack*, accordingly pp. 230, 233-234, 237; moreover, pp. 226 and 229.

tenement house of his wife; in 1600 he defended himself in court against the payment of the debt owed to the sister of his father-in-law)<sup>52</sup>; he also reprimanded those who evasively interpreted the *volenti non fit iniuria* rule<sup>53</sup>. The institutions of the criminal law are for obvious reason little mentioned here.

Only at the beginning, when Klonowic railed against the fact that the law cannot keep up pace with misdemeanours and scams, he recalled an example of Solon, who failed to set penalties for murder of relatives only because he had not expected it could ever be needed<sup>54</sup>. The first such a criminal was mythical Orestes who killed his mother, Clytemnestra<sup>55</sup>. Klonowic indicated also the penalty of the sack for such criminals<sup>56</sup>; then, he gave the view that the justice exists regardless of the written law and should be enforced independently, as a consequence, new misdemeanours must be punished according to common sense in case the provisions of law fail<sup>57</sup>. The penalty of the sack was used as an example of such a procedure. The author emphasized, however, that there cannot be a fair law without justice; moreover, he declared that any old, but unfair law is nothing more than an old mistake<sup>58</sup> that – as Klonowic appeared to be saying – needs fixing. This declaration was followed by the description of elusive lawyers, whom he condemned for their unfair practices, and dishonest sellers and other types of frauds, collectively named lynxes.

It must be clearly stated that Klonowic is hardly known in Poland, similarly as a majority of secondary writers of the late Renaissance and Baroque. On the contrary, his artistic output is known to specialists only. No fragments of his literary works are included in school textbooks. Still, in view of information on various institutions of the contemporary judiciary in *Judas's Sack*, the poem and its author found a prominent place in the history of the former Polish law.

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52 WIŚNIEWSKA (2006), accordingly pp. 72 and 87-89.

53 *Judas's Sack*, p. 213, vv. 25-36 and p. 214, vv. 1-14.

54 *Ibidem*, p. 210, vv. 3-9.

55 *Ibidem*, p. 210, vv. 9-20.

56 *Ibidem*, p. 210, vv. 31-34. Describing the punishment provided for in Roman law (D. 48, 9, 9) he referred to opinions of Mikołaj Jaskier expressed in the translation of the gloss to the article 14 of the Second Book of *Speculum Saxonum* and repeated by Groicki – the wrongdoers must be drowned in a river, and instead of a viper, a lizard should be used; both authors present the symbolical meaning of these animals – see *Judas's Sack*, a commentary on p. 291; JASKIER (1535b), fol. 62; GROICKI, KORANYI, SAWICKI, ORLOWSKA (1953), pp. 209-210.

57 *Judas's Sack*, p. 210, vv. 27-30 and 35-36.

58 *Ibidem*, p. 66, vv. 1-4 and 17-18.

Being an educated law practitioner and a judge in one of the biggest Polish towns, Klonowic was well-acquainted with not only the Greek and Roman history and mythology, but also certain Roman law institutions, as they were known in the 16<sup>th</sup> century on the basis of *Corpus Iuris Civilis* and legal literature. He mentioned both monuments of the Magdeburg Law, applicable in Lublin, as well as its Romanizing glosses<sup>59</sup>. From the point of view of the history of the criminal law it is his description of the procedures of the aldermen's court against thieves: the formulaic pronouncements of the court and the hangman, and the list of tortures used during the trial, which he approved. Also individual offences, criminal careers and fraud techniques, undoubtedly based on Klonowic's and his colleagues' personal experience, are important. They complement other sources to the history of the former law, such as court books. It is also noteworthy that the poem is a valuable primary source to the history of the Polish language, including legal and administrative vocabulary<sup>60</sup> and certain pejorative expressions<sup>61</sup>.

On the other hand, Klonowic's poem (*nota bene* thematically exceptional not only in the contemporary Polish literature)<sup>62</sup> is neither an autobiography nor a diary, but rather a didactic work, published a few times in limited editions. It is addressed, on the one hand, to a narrow circle of literates and scholars familiar with the ancient culture, but on the other hand also to the school-age youth, the main audience of Klonowic's warnings. The descriptions of legal institutions were supposed to educate, correct and admonish the reader. Although the author referred to Roman law institutions, it must be remembered that formally it was not the law applicable in Polish towns. Due to this, the influence of Roman law on the Polish Magdeburg Law cannot be properly estimated without the analysis of the court books. There was no known case of the *poena cullei* with the use of animals in Poland<sup>63</sup>, whereas criminal trials against thieves might have been performed differently in smaller Polish towns, where educated judges of Klonowic's sort were scarce.

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59 Klonowic's knowledge of the Magdeburg Law and Roman Law is highly appreciated in the scientific literature – see Wiśniewska (2006), p. 122.

60 *Ibidem*, pp. 120-123 and 246.

61 Detailed analysis of the vocabulary in Judas's Sack and contemporary Lublin town books was conducted by WIŚNIEWSKA (2006), pp. 138-147.

62 *Ibidem*, pp. 102-103.

63 See GODEK (2005), pp. 91-100. KLEMENTOWSKI (2005), p. 155, indicates only two cases *poena cullei* from Cracow, but we do not have any information about the use of animals 1549 and 1612.

Notwithstanding, there were moments in Klonowic's life when he acted contrary to the principles of honesty, diligence and reliability which he professed in his literary output<sup>64</sup>. He was not in the least willing to repay his debts, thus acting like an unfair debtor condemned in *Judas's Sack*, trying to postpone the repayment of a debt by all means. Still, certain judgements in Klonowic's poem may be attributed to his personal experience, including his rallies against adulterers and seducers of women: we know that Klonowic had a first-hand experience of the activities of such 'foxes'. The modern research forced us to reject the image of Klonowic as a just and righteous man, dominant in the scientific literature a hundred years ago; undoubtedly, it is to Klonowic's loss, but to the benefit of our understanding of the poem.

All the same, it must be emphasized that literary pieces are generally a very valuable sources to the history of the old laws, though one needs to take into consideration the constraints resulting from the genre rules as well as aims and life experience of its authors.

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64 See nt. 17. Noteworthy is an opinion on Klonowic as an attorney included in Zamość town book: apparently, Klonowic disregarded the Zamość court and used inappropriate expressions: see WIŚNIEWSKA (2006), p. 147. Undoubtedly, the principles Klonowic preached in his works were not always respected by him.

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A LETTER FROM DETENTION: THE EDITION OF LETTERS  
OF LIVONIAN HUMANISTIC LAWYER DAVID HILCHEN  
AS AN INTERDISCIPLINARY CHALLENGE\*

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1. *Introduction*

David Hilchen (1561-1610) was a syndic of Riga, acknowledged as the central humanist of Livonia and key figure in terms of legal, linguistic, literary and educational influence<sup>1</sup>. During Hilchen's lifetime Livonia or Livland, divided between modern day Baltic States, belonged to the Polish-Lithuanian Commonwealth (1569-1795)<sup>2</sup>. David Hilchen studied law in the German universities of Ingolstadt, Tübingen and Heidelberg. In his studies he focused on Roman Law and Rhetoric<sup>3</sup>. He has left an unpublished and unexplored Latin correspondence (ca. 800 letters), that will be edited, translated and commented with the help of a research grant by the Estonian Research Council. The present article will demonstrate some difficulties of this very unusual source of law which poses issues for the edition that could not be conquered without interdisciplinary co-operation.

2. *Tradition of letters and the ideals of Humanism*

During David Hilchen's (humanist-name: Heliconius) studies Humanism in German-speaking Europe was at its heyday; he studied in the most renowned universities and was educated not just as a lawyer but as a humanist lawyer. Humanism in a broader sense could be understood as a «mainstream movement of Renaissance to understand the classical antiquity as a norm and ideal»<sup>4</sup>, the main purpose of which was to revive the

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1 E.g. WILPERT (2005), pp. 74-75.

2 Livonia included todays South-Estonia and North-Latvia. Closer about the historical developments, see KASEKAMP (2010).

3 RAMM-HELMSING (1936), pp. 13-15; GOTTSMANN, HÖRNER (2007), coll. 578-581.

4 KRISTELLER (1979), p. 88.

ideals of antiquity, including a pure and aesthetically beautiful language in the Ciceronian way<sup>5</sup>.

Antiquity was at that time being imitated in many ways, one possibility of which was to use eloquent speech and express the knowledge of antiquity through letter-writing. Humanism was the period in Europe where it was important for educated persons to be connected through the form of written communication: letters. After Petrarch's (1304-1374) discovery of Cicero's letter collection, a number of humanists got the inspiration to make their correspondence available for the larger public<sup>6</sup>. For example, Erasmus of Rotterdam used his collected letters as a means of self-presentation, mirroring himself as a learned humanist, familiar with the ancient languages and cultures, but at the same time as a veritable Christian<sup>7</sup>. The same applies to David Hilchen who not only wrote letters according to humanistic ideal to many famous Western European Humanists (e.g. to Justus Lipsius, Isaac Casaubonus, Johannes Caselius, Friedrich Taubmann), but it seems that the collection was initiated intentionally during his lifetime, as had been done in antiquity and by previous humanists. From the original letters that can be found in the main corpus of the collection copies were made (about 700) and the body was put together by another lawyer acting in Riga – Caspar von Ceumern – from 1636-1646<sup>8</sup>.

In the European comparative context, a letter collection of a lawyer is rare phenomenon<sup>9</sup>. Additionally, the huge collection is unique in the whole

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5 For the ideals of humanism in Germany see ZELLER (1973), pp. 58-59. About David Hilchen and humanism in Livonia more in VIIDING (2017a).

6 See DE LANDTSHEER (2014b), pp. 1028-1034 and DE LANDTSHEER (2014a), pp. 335-351. There is also ongoing project about early modern letters in Europe: The inventory of letters can be found on the website Early Modern Letters Online (EMLO). Cultures of Knowledge, <http://emlo.bodleian.ox.ac.uk>.

7 DE LANDTSHEER (2014b), p. 1030.

8 See RAMM-HELMSING (1936), pp. 66-71. There are two main manuscripts: The collection of Caspar v. Ceumern can be found in Latvian State Archives in Riga: HILCHEN. *Epistolae, sex libris digestae ab anno 1600 usque ad annum 1610 in unum volumen redactae, ubi 715 epistolae reperiuntur* (sine anno) Riga LVVA 4038-2-297. The second manuscript is in Linköping City Library (Stadsbibliotek/Stiftsbiblioteket, Br. 43), but contains only a selection of letters. During the project we have found many single letters as well.

9 One of those few belongs to Bonifacius Amerbach (1495-1562), a lawyer and a friend of Erasmus of Rotterdam. The correspondence is published in *Die Amerbachkorrespondenz*. There are also smaller collections from the letters of Hugo Grotius, a lawyer in Netherlands and a German Bilibaldus Pirchheymer (1470-1530). See DE LANDTSHEER (2014b), p. 1034.



north-eastern part of Europe<sup>10</sup>. The exemplary authors for humanistic letter collections came from antiquity. For a lawyer such as Hilchen, Pliny the Younger and Marcus Tullius Cicero, lawyers themselves, were probably the most influential. Pliny's *Epistulae* are a series of personal missives directed to his friends and associates and are a unique testimony of Roman history and everyday life in the I century. The collection was put together by Pliny himself. Cicero's letters to and from various public and private figures inform us about the people and events surrounding the fall of the Roman Republic. While thirty-seven books of his letters have survived into modern times, thirty-five more books were known in antiquity that have since been lost. These included letters to Caesar, to Pompey, to Octavian, and to his son Marcus, but mainly to his friend Atticus<sup>11</sup>. To Cicero what most distinguished humans from brutes was speech that, together with reason, should have enabled humans to settle disputes and live together in concord and harmony<sup>12</sup>. Typically speech was expressed in the form of a letter.

### 3. Gestae of David Hilchen

David Hilchen was not only a secretary (1585-1589) and a lawyer or syndic in the service of the city of Riga (1589-1600), but also he truly incorporated the Renaissance ideal: he had broad knowledge and acted influentially in many fields. At that time in Livonia persons who had legal education from universities were scarce. He wrote different legal acts for Riga as the *Consistorialordnung* for the church and a draft of land law for Livonia<sup>13</sup>, he was active in the educational field as a scholar and reformed an ecclesiastical Dome school into a humanistic Gymnasium. To add even more, he was the representative of the City of Riga and the estates or nobility of Livonia in the Polish *Sejm* or the Parliament, whilst being the *Secretarius Regiae Maiestatis* (secretary of the Polish king Sigismund III Vasa) and a notary in the prot-

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<sup>10</sup> So already RAMM-HELMSSING (1936), p. 66.

<sup>11</sup> CHISHOLM (1911).

<sup>12</sup> There was a time when men wandered about in the manner of wild beasts. They conducted their affairs without the least guidance of reason but instead relied on bodily strength. There was no divine religion and the understanding of social duty was in no way cultivated. No one recognized the value inherent in an equitable code of law (Cicero, *De Inventione*, 1.2.)

<sup>13</sup> See edition and commentary: HOFFMANN (2007).

estant territory Wenden, *Notarius Terrestris Vendensis*<sup>14</sup>. Therefore, he also had reason to write letters on behalf of other persons, a part of the collection contains official letters written in the name of others. Those can be found in the third and fourth book. The first two books contain the so-called *epistulae officiales* which are letters by Hilchen to high Polish and Lithuanian secular and clerical dignitaries. In the last two books, one can find *epistulae familiares* – correspondence with people close to him – humanist scholars and students with a similar world view, altogether to one hundred and twenty-seven persons. The fifth book contains letters to Lithuanian and Polish noblemen and citizens, the sixth letters to famous Western European Humanists<sup>15</sup>. In the schools of Hilchen's time Cicero's letters to his close companions were used to model the writing style and most humanists were attempting to assemble a comparable collection<sup>16</sup>.

#### 4. Letter from detention and the court proceedings of David Hilchen

If Hilchen was not only active and famous, but also a person recognised by all the powers, why was he writing a letter from detention? After being nominated on 2<sup>nd</sup> November of 1589 to the Syndic of Riga, he continued in that position more than ten years. During that time not all citizens of Riga approved his activities and his way of reaching them. This is evident from the satirical writings that have been found from the court acts of David Hilchen<sup>17</sup>.

It seems that the last drop in the 'cup of bitterness' happened in the end of 1599, when Hilchen made public a corruption case of the burgrave (*Burggraf*) and mayor of Riga, Nicolaus Ecke. Only two weeks later, on 14<sup>th</sup> January 1600 he had a conflict with his own vice-syndic Jakob Godemann who was together with the same mayor Nicolaus Ecke at that moment. During the process, Hilchen published an argumentative piece or defence speech about

14 See for details RAMM-HELMSING (1936), pp. 19-46; GOTTSMANN, HÖRNER (2007), coll. 578-581.

15 VIIDING (2015), pp. 58-59.

16 See DE LANDTSHEER (2014b), pp. 1028-1034 and PAPY (2015), pp. 167-182.

17 See the Latin text of [Hilchen] *Catharini Santonellae Horti Musarum in Monte Helicone custodis, contra Cerberum in Elysiis vallibus excubitorem Heliconi oblatrantem Satyra* and analysis in VIIDING (2017b), pp. 87-117. One copy of the satire can be found in *Ander teil der Acten in Sachen* (LVVA, 673.1.344b, pp. 170-177), the other in Poznań PAN Biblioteka Kórnicka (Cim.Qu.3073).

his innocence named *Clypeus Innocentiae* (1604)<sup>18</sup>. A German translation by himself with some additions followed soon after<sup>19</sup>. There Hilchen described how he beat Godemann with rods for the latter had not obeyed him:

«In der Vorburg habe ich ihn mit der Spiesruten, weil er sein Gewähr, darauffer davor mich gefordert und getrozet, nicht hat brauchen dürffen, ein wenig geschmissen»<sup>20</sup>.

This was the beginning of court proceedings that lasted nine years and gave plenty of reasons to write many letters, mainly in Latin. The letters in the collection belong to that period of Hilchen's life. There are actually two different proceedings: first the *iniuria* against Godemann in private proceedings. Second, a high treason process or *Vorreterey* in another against the city of Riga<sup>21</sup>. The literature<sup>22</sup> has until now emerged from just one court case as the two proceedings were partly treated in court together. The court materials are not only a good source for legal historians, but also for other disciplines<sup>23</sup>. The acts of Hilchen's case reveal a variety of documents: personal letters in Latin and German, satirical writings, contracts etc. In this way additions for the Latin letter collection that is being edited were found, but also a further type of letter which will be presented below.

The letter (image 1) from detention is dated to 15<sup>th</sup> January of 1600, the day following the incident in the *Vorburg* or first court of the castle. It is clear from the address (or the writing on the letter) that it was written in incarceration and inscribed to the burgrave whose position at that time was occupied by the aforementioned Nicolaus Ecke<sup>24</sup>.

The letter is very different from all others – both in form and content – and the extreme situation is evident. It is not written in Latin but German and was not included in the collection of letters: it was found, disassociated, in the court acts. It seems to be written in haste, probably in candlelight, the rows are uneven and the handwriting is barely legible. The contents do not

18 HILCHEN (1604).

19 HILCHEN (1605).

20 HILCHEN (1605), p. A3 verso.

21 As our research project is quite in the beginning and recently we found 5 acts with his court cases, all the details in dating and the order of actions are not clear yet.

22 RAMM-HELMSSING (1936), pp. 55-59.

23 See also KAJU (2017), pp. 215-256.

24 *L[itte]rae Hilchenij / ad Burgrabium Rigen[sem] / ex carcere curiali 15 / Jan[uarii] A[nn]o 1600 datae*, pp. 90-91.

show humanistic knowledge of the ancient authors as was evident in the Latin letters in collection.

Both Hilchen and Ecke were eminent persons of the city; they had worked together previously and until that moment had had both conflicts as well as positive interactions. In his later letters and the following *Clypeus Innocentiae* it is clear that Hilchen accuses Ecke specifically in initiating the processes against him and considered the actual adversary, Jacob Godemann, merely instrumental in his process. In his letter of detention he was not aware of Ecke's role in his detention. Rather, he begs Ecke to help him, stressing that he has served the city for fourteen years and they have had a certain friendship<sup>25</sup>. From the letters written afterwards is clear that he thinks Ecke is accountable for his predicament, conspiring with the city council of Riga, which was presided by Ecke. For example, almost a year later, on 10<sup>th</sup> December 1600 he writes to his supporter, patron and chancellor of the Polish kingdom, Jan Zamoyski: «Si haec non est iniuria, quam a Senatu Rigensi et Godemanno patior, nulla est (...)»<sup>26</sup> (If this wrong is not a wrong that I have suffered by Godemann and the council of Riga, there is none.). Here Ecke is accused being the initiator only indirectly.

A year and a half later, on 5<sup>th</sup> September 1602 from the Estonian Weissenstein (Paide), stems a letter in which Hilchen has no doubts as to who has planned to ruin him: «Eckius est, is est, ipse est auctor et architectus et rerum mearum perturbator»<sup>27</sup> (The author and architect and the disturber of all my matters is Eckius himself).

So in the letters the conflicts and intrigues of an early modern city can be seen, even if only through the perspective of a single person.

The processes against Hilchen went swiftly at first. Ten months after the incident, on 15<sup>th</sup> October 1600, Hilchen was sentenced *in absentia* by the court in Riga (as he was partaking in a war against Sweden in the territory of Estland). As a part of the punishment his picture was publicly caned<sup>28</sup> and his possessions such as his house etc confiscated or burned down. On 8<sup>th</sup> May of 1601 Hilchen was sentenced to death, again *in absentia*, and declared an

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25 «Wo noch ein funcklein der Alten u[nd] erneuerten Freundschaft ubrig ist (...)». LVVA 673, 1, 344a, p. 90.

26 Hilchen to Zamoyski: 12<sup>th</sup> October, pp. 20-23.

27 1600-12-10. Riga LVVA 4038-2-297 p. 29v-30v (liber 1,60); Linköping Stadsbibliotek/Stiftsbiblioteket, Br, p. 39v-41 (liber 1,60).

28 RAMM-HELMSSING (1936), p. 56.

outlaw<sup>29</sup>. From Riga legates were sent to the Polish king to get the sentence approved. Hilchen from his exile in Poland appealed to the king at the same time. Thus, the process was to be continued in Warsaw and was undecided until 1609 when Hilchen was finally exculpated and all his property and positions were restituted<sup>30</sup>.

### 5. *Inter-textual analysis of humanistic letters*

Letters as a juridical source are not too common: neither as a published source nor as a subject of legal historical analysis. The inter-textual analysis of letters, especially early modern letters, has a much longer tradition in classics and Neo-latin philology. In the case of the letters of Hilchen the interdisciplinary teamwork has been extremely fruitful for both sides. Humanistic letters are indeed a way to show the Ciceronian ideal: to share knowledge which can be expressed in written correspondence and is a way to «settle disputes and live together in concord and harmony» as said Cicero. The knowledge is expressed through the use of Greek and Roman authors as sources for allusions, imitation, paraphrases and quotations. Usually the origin of the used text was not indicated but the educated reader of was presumed to recognise it. The Latin letters of Hilchen are also full of quotations and allusions to different Greek and Roman literary authors. In the Master's thesis of Mari Linder, written in the framework of the project<sup>31</sup>, intertexts in assorted letters have been analysed. She concluded that «The most important function of the intertexts in Hilchen's letters is demonstrating the erudition, which is shown by the multitude and wide variety of intertexts and their source texts. In fact, when not explicitly marking the intertexts with author's reference he is complimenting the addressee's erudition as well, because he supposes that the addressee will recognize the intertext»<sup>32</sup>. An example from Linder's work, an excerpt from a letter to the Pole Johannes Ferdinand Piaszecki<sup>33</sup> in 19<sup>th</sup> July of 1607, is presented below:

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29 RAMM-HELMSSING (1936), pp. 56-57.

30 *Decretum Sac[rae] Regiae M[aiestatis] in causa Hilchenij An[n]o 1609*, pp. 112-117.

31 LINDER (2017).

32 LINDER (2017), p. 63.

33 Until now we have not find out more about the person of Piaszecki. His name hints that he is Polish and the content of the letter – as in the letter the questions of style were discussed – to his good education. LINDER (2017), p. 42.

«S[alve]. (...) Tu vero in hoc genere, cur capisti, ne provocatus quidem, adeo subtiliter, adeo scite, ut me meae sterilitatis etiam nunc pudeat. In simili causa et ratione cur *non idem ius* valeat? Victum tamen te a me esse dicis. *O vis amoris* et ingenij!» (...)»<sup>34</sup>.

The underlined parts contain either a citation, allusion, etc to classical authors and the letter is full of them. The first is probably to Marcus Terentius Varro's *De lingua latina* 9.5<sup>35</sup>:

«Alia enim populi universi, alia singulorum: et de his non eadem oratores et poetae: quod eorum *non idem ius*» (For some words and forms are the usage of the people as a whole, others belong to the individual persons; and of these, the words of an orator and those of a poet are not the same because their rights and limitations are not the same)<sup>36</sup>.

The model for the second underlined phrase «*O vis amoris* et ingenij» originates from Cicero in *Epistulae ad Familiares* 2.7.2.14<sup>37</sup>, where the expression *vis amoris* is used:

«Tametsi hoc minime. tibi deest; sed tamen efficeret magnitudo et vis amoris mei, consilio te ut possem juvare» (Though you have not the slightest need of it, still such is the extent and intensity of my affection, that I might have proved of some assistance to you with my advice)<sup>38</sup>.

At the same time the citations or allusions to legal authors are quite seldom. One of them hails from a letter to Andreas Lavitius, a Jesuit and professor of rhetoric and poetics. There Hilchen cites the Roman lawyer Ulpian:

«*Eleganter* in spacijs Juridicis Ulpianus in l. 4. De alien. jud. mut. causa fac. Verecunda (inquit) cogitatio ejus, qui lites execratur, non est vituperanda»<sup>39</sup> (In the legal field Ulpian elegantly states -l. 4. De alien. jud. mut. causa fac-<sup>40</sup>: a very modest determination of one who detests lawsuits, and is not to be blamed).

First, there is a citation to Ulpian after which, intentionally or not, Hilchen

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34 1607-07-19. The letter has actually another part of the same length.

35 LINDER (2017), pp. 43-44.

36 Varro, *De Lingua Latina*.

37 LINDER (2017), pp. 43-44.

38 Cicero. *The letters to his friends*, pp. 112-115.

39 1608-10-22. Riga LVVA 4038-2-297 pp. 42-42v; Linköping Stadsbibliotek/Stiftsbiblioteket, Br 43, pp. 55v-56v.

40 Dig. 4.7.4.1.

uses a common style in introducing the texts of other lawyers in the Digest: «elegantior». For example, Ulpian himself used «elegantior» in D. 7.2.1.3 in the expression «Ut Celsus et Iulianus elegantior aiunt». In the same book four of the Digest, which was quoted by Hilchen, Ulpian used it four times to cite other lawyers<sup>41</sup>. The use of «elegantior» by Hilchen was, therefore, probably not accidental but hints to the use of the expression by Ulpian. Additionally, Hilchen specifies the source of the quotation to make it clear for a non-lawyer.

## 6. Legal terminology in letters of Hilchen

Most of the letters date back to the years 1600-1610, that is to say the time when Hilchen's court proceedings began. Many of the letters refer to his *res* (process) or *res et fama mea* (my process and my reputation). For example, on 11<sup>th</sup> October 1604 he asks from Theodor Adam, a lawyer and professor at the University of Helmstedt (23<sup>rd</sup> February of 1566 til 1613), to send him on the basis of his Latin *Clypeus Innocentiae* testimony of him and his reputation: «Te igitur (en fiduciam) rogo /(...) /, et cum Testimonio quod in rem et famam meam sit, benigne mihi remittitur»<sup>42</sup> (I ask you -to trust me- /... / and send me back your benevolent testimony about my process and my reputation). This is a theme that repeats itself often. He sent his *Clypeus Innocentiae* to many scholars all over Europe with a similar entreaty. The reputation was not only the question of good report but had legal significance as a part of a process about *iniuria* (assault as personal wrongdoing) as well<sup>43</sup>. He often describes the events of his process and persuades different persons to support him or to give him an overview from their viewpoint. Thus, to understand the letters the legal background is necessary.

This becomes clear in a letter from 10<sup>th</sup> December of 1600, almost a year after the beginning of his proceedings. It is again addressed to Jan Zamoyski, Hilchen's patron. The letter is long and detailed, so here just a short passage is presented:

«Quae sententia tot nullitates, quot lineas continet. Non faciam, ut enumererem omnes, hoc tantum dico, quod ius non ex citatione sit dictum, sed ex disparato vel plane desperato capite. Citatio enim me Citatum et prodicionis reum; Sententia vero actorem me constituit et verbalis iniuriae recantatorem» (This judgement has many lines but contains

<sup>41</sup> Dig. 4.8.21.11; 4.2.9.1; 4.3.7.pr; 4.4.3.1.

<sup>42</sup> 1604-10-11. Riga LVVA lib. 6,40 (pp. 282v-283).

<sup>43</sup> See about legal questions in the *iniuria*-process FUCHS (1999).

also many invalidities. I do not want to enumerate them all but I want to say just this: the sentence was not based on the summons but rather on the inappropriate [arguments] or on the felony. In the summons I was called as a delinquent of high treason, in the judgement as a plaintiff and as a person who answered to an insult with another)<sup>44</sup>.

The letter is very juridical and almost every sentence includes different juridical definitions. At the same time the *recantator* contains an allusion to Horace *carmina* 1.16.27<sup>45</sup>. So it is nearly impossible to edit those letters with commentaries alone by the representative of one field. It could be done only as interdisciplinary teamwork.

### Conclusion

Even from this short article it can be derived how Hilchen wanted and tried to follow and live according humanistic ideals. It concerned his activities for the sake of his fatherland, his style of writing and the ideal manner in which to compose the letters. Even the fact that the collection was composed from exile had its humanistic models. Part of Cicero's letters were written from exile, Italian humanist Petrarch and French humanist Marcus Antonius Muretus (1526-1585) were both in exile<sup>46</sup>. During the court proceedings that he considered unjust and in which the Polish king was unwilling to decide, Hilchen's frustration is obvious yet still the Ciceronian ideal for harmony in speech, settling disputes in an equitable way and the faith in God's justice is kept.

On the other hand, it can be seen from the letters that Hilchen stresses the importance of virtue of patience as Justus Lipsius before him<sup>47</sup> and that God only can help and will punish the wrongdoers. So on 11<sup>th</sup> December of 1608 he writes to the bishop of Wenden Otto Schencking: «Ego ero patiens tam diu, quoad volet is, q[ui] nisi pati me vellet, haec nunq[uam] accidissent: cum in hac q[ui]dem parte non modo culpa sed et crimine caream» (I will be patient, as wants the one who does not want to see me suffer, but now it still hap-

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44 1600-12-10. Warszawa Archiwum Głównie Akt Dawnych, 358 Archiv Ord. Zamoi-skich Warschau Tom VII, Plik 66 BL 20-23.

45 «Nunc ego mitibus / mutare quaero tristia, dum mihi / fias recantatis amica / opprobriis animumque reddas». The author thanks Kristi Viiding for finding the allusion.

46 DE LANDTSHEER (2014b), pp. 1028-1034.

47 See about the patience as a virtue, which helps to withstand calumny in JUSTUS LIPSIUS (1593).



pened: though in that part I do not have fault nor did I commit the crime)<sup>48</sup>. Still, sometimes he loses peace of mind and is very disturbed of the length of the process and the inactivity of the Polish king. Hilchen had opportune moments to practice the virtue of patience: he faced calumny even before the court proceedings so in 1599 he already writes satirically:

«Conscia mens recti atque animus sibi in omnibus aequus / Plurima dissimulat, patitur: patientia tandem / Fit furor, atque animo vires calamumque ministrat, / Vindicet ut falsos fucato pectore fucos»<sup>49</sup> (Although the mind which knows the righteous path and the conscience which feigns and bears much stays true, from the patience ultimately fury arises, that gives the mind a valiant feather to punish the arrogant and untruthful drone bees -busy bees-).

During the ongoing processes his patience got tested many times.

Those letters full of humanistic knowledge but also legal terminology and knowledge in background presume too much from different fields to be translated or edited by the representatives of only one area of study.

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48 1608-12-11. Riga LVVA 4038-2-297 p. 20 (liber 1,20), Linköpings Stadsbibliotek/Stiftsbiblioteket, Br 43 pp.17-17v (liber 1,20).

49 [Hilchen], *Catharini Santonellae Horti Musarum in Monte Helicone custodis, contra Cerberum in Elysiis vallibus excubito rem Heliconi oblatrantem Satyra*, published in VIIDING (2017b), p. 114.

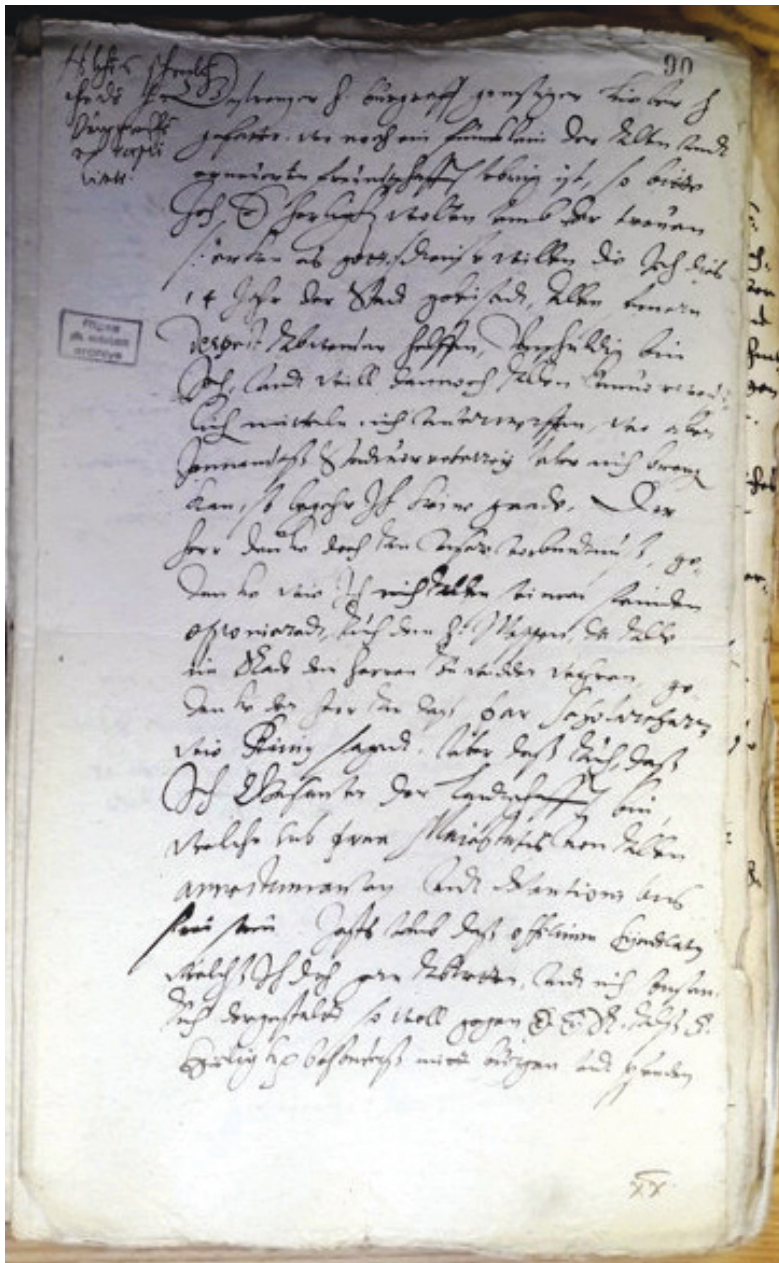


Image 1

LVVA, 693, I, 344a, pp. 91-92.

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THE CASE OF ESZTER SOLYMOSI FROM TISZAESZLÁR:  
THE NOTORIUS BLOOD LIBEL TRIAL THROUGH  
THE EYES OF GYULA KRÚDY\*

IMRE KÉPESSY  
*Eötvös Loránd University*

«Eszter Solymosi, of whom people spoke very often in the last decade of the past century, was a sad, brown haired girl. She was a maid in Tiszaeszlár, a small village in county Szabolcs.

If her acquaintances had known, that one day Eszter will be more famous than a queen like a star walking down the earth and disappearing without a trace: surely they would have remembered her better while she was living in this world».

Laura Palmer's death was one of the greatest mysteries in the TV show called *Twin Peaks* in the early 1990s. According to his original plan, director and series creator David Lynch never intended to reveal the true identity of the killer, only to give some (often conflicting) hints about him or her. Due to the declining viewer base, however, the channel overruled this decision. I managed to get the results of a poll, that was held in a TV show just before the big reveal<sup>1</sup>. There, the audience had the chance to vote for their 'favourite' suspect. I must say (without spoiling too much), that Mr. Lynch quite successfully played the viewers, because only 3 % of the voters *guessed* the real killer. I must emphasize the word 'guessed', because we never got enough information to identify the murderer in the first place. Of course, this is quite normal in the entertainment business. We want to be engaged with the story, and when the final twist comes, we want to be surprised.

Of course, the question may arise, why bring up this TV show as an example? Mostly, because the origins of this series lie in a young girl's death in upstate New York in 1908, which bears some similarities to the case I'm about

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<sup>1</sup> See *The Phil Donahue Show*.



to present to you. The victim's name was Hazel Irene Drew and her body was discovered floating in Teal's Pond, twelve miles from the city of Troy<sup>2</sup>. The water had distorted Hazel's features to the extent that she could only be identified through her clothes and the gold fillings in her teeth. The cause of death was a blow to the back of the head and the evidence pointed overwhelmingly to murder. However, as of today, the mystery of who killed Ms. Drew and why remains unsolved. Just as in the case of Eszter Solymosi.

### 1. *The 'gone girl'*

«Eszter Solymosi, of whom people spoke very often in the last decade of the past century, was a sad, brown haired girl. She was a maid in Tiszaeszlár, a small village in Szabolcs county. If her acquaintances had known that one day Eszter will be more famous than a Queen: that she will be like a star walking the Earth and disappearing without a trace: surely they would have taken better note of her while she was still walking this Earth»<sup>3</sup>.

Krúdy described the girl who went missing on 1<sup>st</sup> April of 1882, with these words. Those remarks about her stand true even today, because despite all their efforts, the historians managed to gather only pieces of information so far. We know that she was born in 1867, and she had two brothers (one of them deceased)<sup>4</sup> and a sister with whom she went together to school<sup>5</sup>. According to one of the witnesses in the trial, Eszter missed a lot of classes because she had to support her family. Therefore, she had to become a domestic servant just like her sister in 1880. Her last employer was Andrásné Huri, with whom they were distant relatives. According to the statements, Huriné was a quite hot-tempered person who treated her servants (including Eszter) quite badly, she even beat them<sup>6</sup>.

Eszter Solymosi's character (her fictional self) as well as her trial also appeared in many adaptations. Károly Eötvös, one of the accused's defenders at the murder trial, published his notes about the case in the book called *The Great Trial Going on for a Thousand Years*<sup>7</sup>. József Bary, the inquiry judge,

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2 HAWKES (2017).

3 KRÚDY (1975), p. 26.

4 Kövér quotes EÖTVÖS (1968), pp. 69-70.

5 KÖVÉR (2011), p. 314.

6 KÖVÉR (2011), pp. 316-317.

7 See EÖTVÖS (1968).



who wrote in his memoirs extensively about the case similarly had that published<sup>8</sup>. Bary, of course, tried to defend the state's (and by doing so, also his) actions in the process. The most famous artistic interpretation belongs to journalist and writer Gyula Krúdy, one of the most iconic authors in Hungary in the early 20<sup>th</sup> century. He heard many things about the trial in his grandfather's house during his childhood. In Krúdy's own words: «[In those days,] [t]he children have listened to the different versions of Eszter's murder instead of fairy tales»<sup>9</sup>. Furthermore, his grandfather was a lawyer who held many meetings about the case in his house<sup>10</sup>. Krúdy used those memories besides the available documents to reconstruct the events but also tried to give context to it when he wrote about the contemporary society, people's beliefs and their relationship to the Jewish minority.

## 2. *The disappearance*

According to the information gathered so far, we know for a fact that Huriné's neighbour went to her house because she needed some paint on 1<sup>st</sup> April in the morning. She could not help her, but Eszter volunteered to go and buy it. Krúdy described this scene a little differently: according to him, Huriné wanted to repaint her own house, but actually it was her neighbour, on who's account Eszter went to do the shopping. Both the witnesses<sup>11</sup> and Krúdy mentioned that Huriné yelled at Eszter that morning<sup>12</sup>. We can assume that's why she was so eager to get away even if just for a little while. The nearby Jewish shops were closed on Saturday, so she had to go to the other side of the town. On foot, the distance was approximately forty minutes<sup>13</sup>. Krúdy mentioned another interesting detail, namely that «Eszter never sang, like other maids do (...). She was a sad, voiceless soul»<sup>14</sup>. Krúdy already described her once in this manner<sup>15</sup>, but I must point out this notion because according to her own sister, Eszter indeed looked woeful on this day, but she did not ask her why.

Eszter left Huriné's house at around ten o'clock in the morning. She met

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8 See BARY (1033).

9 KRÚDY (1975), p. 24.

10 KRÚDY (1975), p. 25.

11 KÖVÉR (2011), p. 341.

12 KRÚDY (1975), p. 48.

13 KÖVÉR (2011) quotes EÖTVÖS (1968), p. 27.

14 KRÚDY (1975), p. 47.

15 KRÚDY (1975), p. 26.

several people on the way, for example a former schoolmate who walked with her for a little while<sup>16</sup>. She also met her sister, who worked at a family that lived along the way<sup>17</sup>. The shopkeeper could only remember the fact that Eszter was there but could not give any details when he testified for the first time. Her way back to Huriné's house is much more mysterious. At first, her sister testified that they met around eleven o'clock, when Eszter was returning from the shop<sup>18</sup>. While giving her second testimony, she said that they met between eleven-twelve o'clock, when Eszter was only going to the shop. Other witnesses, who were with Zsófi on this day testified, that they met indeed two times, but most of the witnesses were unsure of the exact time. This is mostly due to the fact, that most of the people did not use watches, so their sense of time was inaccurate. They said only things like we were just getting started for lunch etc<sup>19</sup>.

From this point on, everything becomes unclear. Eszter's employer became suspicious around noon. She thought that maybe Eszter stole the money but she started searching for her at around three o'clock in the afternoon<sup>20</sup>. She went to Eszter's mother looking for her, but she was not there. Eszter's mother started searching for her with her sister. Later in the evening, they met József Scharf, the clerk at the synagogue. He said the following: «Do not worry about your daughter's disappearance, she will surely turn up again; it had already happened before that upon the disappearance of a Christian child, the Jews had been accused, even their ovens searched, but the child nevertheless reappeared later»<sup>21</sup>. We don't know exactly why he said that (according to historian György Kövér, maybe someone already hinted at it or he simply sensed the danger ahead based on historical experiences)<sup>22</sup>, but Eszter's mother agreed that these were the exact words. Later, both Scharf and his attorney thought that the accusations originated from the poor choice of words. Krúdy mentioned this conversation in his book too. In his view, Scharf had to express his opinion even if nobody asked him to<sup>23</sup>.

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16 KÖVÉR (2011), p. 341.

17 *Ibidem*.

18 KÖVÉR (2017), p. 39.

19 KÖVÉR (2011), pp. 347-348.

20 KÖVÉR (2011), p. 349.

21 KÖVÉR (2011), p. 351.

22 KÖVÉR (2011), p. 352.

23 KRÚDY (1975), p. 58.

### 3. *Samu's tale*

József Scharf had two sons, Móric and Samu. The younger, Samu who was nearly five at the time told a tale a few weeks (or on other account, just a few days) after Eszter disappeared<sup>24</sup>. Accordingly, Scharf brought a girl into the synagogue, held her, while Móric held her head and the Jewish butcher cut her leg. Samu did not mention Eszter's name, he spoke only about a girl or a young girl. Later, he told the inquiry judge that the butcher did not cut her leg, but he slit her throat and his brother collected the blood in a plate. Now, Krúdy mentions an interesting conversation in his book that happened between Scharf and Eszter's mother the day of the girl's disappearance. Accordingly, the synagogue clerk told the mother that he invited her daughter into his house, where he asked her to move the candlesticks from the table because his religion forbade him to do so. However, Krúdy emphasized, that this conversation was only a pure fabrication and there was no proof whatsoever of them meeting that day<sup>25</sup>. Actually, Scharf hardly knew Eszter. In Krúdy's narrative, the villagers noticed that every time, they mentioned the girl's disappearance to the temple clerk, he got upset by these insinuations. So, in his interpretation the villagers wanted to pull a prank on him by making his son tell this story<sup>26</sup>.

Nevertheless, the boy told this story to a eleven-twelve-year-old girl first, who told her mother<sup>27</sup>. It was not long, before the gossip reached Eszter's mother. She notified the authorities about her daughter's disappearance by then, but the town-clerk only issued a warrant of caption but did not search the synagogue. Later, she went with this information again to the district administrator and visited even the president of the district tribunal. Both said however, that she should not give credit to such rumours. However, with Eszter still missing, the court ordered an inquiry a month later<sup>28</sup>. They selected József Bary as the inquiry judge, who had not yet passed his legal exams at the time. According to his memoirs, he was chosen because the senior judge was ill and nobody would have thought at the beginning, that this case will

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24 KÖVÉR (2011), p. 357.

25 KRÚDY (1975), p. 57.

26 KRÚDY (1975), p. 61.

27 KÖVÉR (2011), p. 358.

28 KÖVÉR (2011), p. 366, STIPTA (2012), p. 27.

have any importance at all<sup>29</sup>. He emphasized, that there were no disqualifying regulations against him. This argument is however, only partially true.

#### 4. *The inquiry*

To understand this case or the mere fact how such superstitious charges could be brought before a court of law in Hungary in the late 19<sup>th</sup> century, we must briefly look at the legal environment of that time. By 1883, when Eszter Solymosi's case went to trial, Hungary had adopted a modern Penal Code<sup>30</sup>, but lacked a proper act regulating the criminal procedure. A proposal was drafted which became well-known as the *Yellow Book* in 1872, which was used by the courts. However, in practice, some elements of the inquisitorial system remained in effect (for example, during the preliminary investigation the participation of the defence attorneys was very limited, the presumption of innocence did not prevail entirely, the authorities did not have the obligation to inform the suspect about the charges). Furthermore, the entire process lacked the necessary guarantees and on top of that, the judicial practice varied in the different regions of the country. So, regarding the exclusion of József Bary, there could not have been a contradictory regulation since there was no proper act of criminal procedure<sup>31</sup>, but according to the *Yellow Book* and the practice of the courts he should have been excluded from leading the inquiry<sup>32</sup>. The country tribunal however, disregarded these rules.

The case was immediately labelled a blood libel trial by the public. The inquiry judge categorically denied treating the case as such even in his memoirs. He argued that there was no such crime defined in the Criminal Code, the accused were charged with murder. However, at the beginning of the inquiry, he requested official copies of the blood libel trial which was conducted in Peér (or Pér) in 1791. Furthermore, only Jewish people were accused through the process<sup>33</sup>.

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29 KÖVÉR (2011), pp. 367-368.

30 BÓDINÉ (1994), pp. 2-7.

31 STIPTA (2012) quotes BARY (1933), p. 32.

32 STIPTA (2012), p. 26.

33 KÖVÉR (2004), p. 7.

## 5. *The confession*

The inquiry judge interrogated two people on the first day of the inquiry: József Scharf and his five-year-old son, Samu. Based on the Samu's testimony, he had József Scharf, Móric Scharf (Samu's brother), Salamon Schwarz (the *kosher* butcher) and Ábrahám Braun be taken into custody<sup>34</sup>. Móric was separated from the others and they kept him in the village mayor's house. He was transferred to Nyíregyháza the day after. During this time, a gendarme and a clerk watched over him while in custody. On the eve of 20<sup>th</sup>/21<sup>st</sup> May, he confessed, naming Salamon Schwarz (the butcher) as the killer, while also named four other people who were in the synagogue with him. Móric did not name his father as an accomplice<sup>35</sup>, but said that he invited the girl into his house and asked for her help to move the candles. The confession continued as the follows: «A tall beggar Jew came into the house, grabbed her hand and lured her into the temple. There he floored her and the two butchers grabbed her. (...) The butcher from Tiszaölök slit her throat while the others gathered her blood in a plate»<sup>36</sup>. According to Móric, he saw the whole thing through the synagogue's keyhole<sup>37</sup>. Later, when he told everything to his parents, they ordered him to keep quiet about all of this<sup>38</sup>.

The circumstances of this testimony raised serious concerns. First, this 15-year-old child was taken away from her legal guardians and was interrogated without their presence<sup>39</sup>. The inquiry judge was not present when he testified<sup>40</sup>. Furthermore, the phraseology used in the testimony was not anything like a 15-year-old without any legal knowledge would use (indirectly this was acknowledged by the inquiry judge, who stated that the gendarme simply clarified Móric's words)<sup>41</sup>. Móric's testimony was basically the compilation of the hearsay about Scharf inviting the girl to his house and Samu's tale about the alleged cutting. However, there were severe inconsistencies within the testimony. Móric testified to hearing the girl scream<sup>42</sup>. According

34 See KÖVÉR (2011), p. 377.

35 KRÚDY (1975), p. 161.

36 KÖVÉR (2011), pp. 378-379.

37 KRÚDY (1975), p. 169.

38 KÖVÉR (2011), p. 379.

39 STIPTA (2012), p. 26.

40 BARY (1933), pp. 46-47.

41 KÖVÉR (2011) quotes BARY (1933), p. 79, EÖTVÖS (1968), p. 115.

42 KRÚDY (1975), p. 168.

to him he went to the temple after hearing her and he saw the butcher cutting her throat only then. The time difference between the scream and the killing was unrealistically big<sup>43</sup>. Furthermore, nobody else could hear the screams. The defence also argued that the visibility was rather poor through the front door's keyhole and before the court, the expert witnesses also questioned the description of the alleged murder<sup>44</sup>. According to them, if Eszter would have died instantly (like Móric said) then the cut should have been so deep that her blood would have spirted out. Finally, other witnesses testified that some of the accused were elsewhere in that time.

Another important turning point was the body found in Tiszadada<sup>45</sup>. This small village was situated on the coast of the river Tisza<sup>46</sup>. In July, a floating corpse was found by some rafts men, while it was floating in the river. The clothes on her were like those which were on Eszter on 1<sup>st</sup> April<sup>47</sup>. At first, some witnesses argued that it was indeed Eszter<sup>48</sup>. Her mother denied this and so did the other closes relatives even if their teeth were similar<sup>49</sup>. There were no scars on the body, but according to the expert witnesses she did not drown<sup>50</sup>, so somebody had to throw the corpse in the river (later, in the trial this was also disputed). One of the gendarmes suspected that maybe the rafts men put Eszter's clothes on somebody else's body to mislead the inquiry<sup>51</sup>. He managed to get a full confession from one of them<sup>52</sup>, but he was suspended from the office for abuse of authority just before the trial started. As Krúdy wrote, «The winds have changed, the time for the loyal servants of the county was almost up»<sup>53</sup>.

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43 KÖVÉR (2011), p. 383.

44 *Ibidem*.

45 KÖVÉR (2011), p. 459.

46 They found two bodies, the first in the nearby village of Tiszalök in April. The first corpse was exhumed but turned out to be somebody else's body. See KÖVÉR (2011), p. 440.

47 KÖVÉR (2011), p. 460.

48 KÖVÉR (2011), p. 463, KRÚDY (1975), p. 224.

49 KÖVÉR (2011), p. 464.

50 KÖVÉR (2011), p. 476.

51 KÖVÉR (2011), p. 496.

52 KRÚDY (1975), p. 298.

53 KRÚDY (1975), p. 347.

## 6. *The trial*

In total, three people were accused of committing premeditated murder. Another seven people were accused of being accomplices to the crime while six people were charged with aiding and abetting. That equals a total of sixteen people<sup>54</sup>. I must emphasize, that there were only two crimes punishable with the death penalty in Hungary at the time: premeditated murder and some variants of high treason<sup>55</sup>. The case went on trial in the summer of 1883. The public interest peaked. Every newspaper reported on the trial, not just in Hungary but also in many European countries. The presiding judge was the president of the county court and the other members were characterised by the inquiry judge as being ‘exceptional in civil law cases’. The state attorney argued in his opening statement, that his duty was to make sure that only those would be punished who without a doubt committed a crime and he would not hesitate to exonerate the innocents. He also emphasized that his office already proposed the release of one of the accused. In his view, dining together with someone is not sufficient to hold someone let alone to charge him with accessory to murder. He reminded, that the court of law denied his motion. This was followed by a public uproar, Krúdy even mentioned, that his father, together with many attorneys, wrote a letter to the minister of justice<sup>56</sup>. They argued that there was no public prosecutor in this case only two defence attorneys.

In the trial, the defining moment was Móric Scharf's testimony. The ‘star witness’ not only upheld his original testimony but seemingly spoke with hate towards his origins, his family and his religion<sup>57</sup>. I must emphasize (just like Krúdy did)<sup>58</sup> that at the time, he was locked up for almost a year. He also claimed in an interview decades later, that he had no other choice but to testify but this is at least partially questionable. Although he did not accuse directly his father, the most shocking scene was, when he was confronted with him about his testimony. This scene is depicted in Krúdy's book by quoting the original court records<sup>59</sup>. Without any hard evidence, the main question

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54 KÖVÉR (2011), p. 532.

55 See the Hungarian Criminal Code of 1878 (Act Nr. 5), § 278.

56 KRÚDY (1975), pp. 479-481.

57 KRÚDY (1975), p. 444.

58 KRÚDY (1975), p. 429.

59 KRÚDY (1975), pp. 427-434.

was if the court was willing to administer an oath on Móric's testimony. This could have led to the conviction of the accused, but two of three judges voted against it (only the presiding judge supported the motion). Their reasoning was, that the testimony proved to the court the witness' hatred towards his father, which the judges found alarming. Besides his immaturity, his testimony was inconsistent on many account, like who was the person who invited Eszter to their house, which colour was her kerchief and the depiction of the alleged murder was in many ways also contradictory<sup>60</sup>. So, even if there was no legal requirement for the witness to belong to some religion in order to have him put under oath (Móric repeatedly said that he wanted to abandon his religion), the court decided not to administer the oath to him. Moreover, the defence lawyers proved during the trial, that the court clerk responsible for recording Móric's original testimony was charged and found guilty fifteen years earlier, for murder. This development also led the judges to question the integrity of his words.

In the end, every one of the accused, even the rafts men were acquitted<sup>61</sup>. One of them maintained his confession to aiding and abetting right until the end, but the court did not find his testimony reliable. Eszter's mother appealed the judgment twice, but both were rejected. As of Eszter Solymosi, we never learned what happened to her. The defence attorney argued that she may have committed suicide. Some people believed that it was her corpse found in the river. Some speculated about a forbidden love between Eszter and Móric while rumour had it<sup>62</sup>, that she was a victim of human trafficking<sup>63</sup>.

The 'Great Trial' came to an end but it also had some grave consequences<sup>64</sup>. The public was clearly divided by the decision (without any compelling evidence, it was easy to criticize it), and this case helped ignite anti-Semitic movements in Hungary<sup>65</sup>. For the government, it clearly indicated the need for a modern code of criminal procedure. The discrepancy between the contemporary Hungarian constitutionalism and mistakes made in this trial (which were made possible by the loopholes in the legal system) urged the

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60 KRÚDY (1975), p. 551.

61 KÖVÉR (2011), p. 559.

62 KÖVÉR (2011), p. 518.

63 KRÚDY (1975), p. 588.

64 KRÚDY (1975), p. 585.

65 The newly-formed *Antisemitic Party* won in several constituencies in the Hungarian general elections of 1884. For the full result see: <http://mpgy.ogyk.hu/mpgy/valaszta-siterkep/eredeti/1884-87.gif>.



legal experts and the legislators to move forward with the adoption of the new Code of Criminal Procedure.

One thing for sure: it is thought-provoking what Károly Eötvös wrote in his book: «Without acknowledgement, the truth has no impact. It is just a shout into the void»<sup>66</sup>. I think that's one reason why Krúdy also wrote about this trial. He sensed that even fifty years later, Eszter Solymosi's death still divided the Hungarian society. For some, even the accusations were preposterous while there were others, who blindly believed in the accused's guilt. In this trial, the biggest mistake was made when some of its participants deferred to the political and social pressure. On one hand, it is the duty of the legislation to make sure, that the judiciary would not be influenced. On the other hand, a simple legal rule can be limited in its capacity. It is also our responsibility to speak up against injustice. Krúdy, as a writer, thought that he can make a difference by writing this book. We can only applaud him for that.

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66 EÖTVÖS (1968), p. 11.

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READING A TRAVEL JOURNAL.  
THE MELANCHOLIA OF GINA LOMBROSO IN LATIN AMERICA

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In May 1907 Cesare Lombroso's second child, Gina (Pavia, 5<sup>th</sup> October, 1872-Geneva, 27<sup>th</sup> March, 1944) set off for South America, on a six month journey with her husband Guglielmo Ferrero. He was a renowned exponent of the Italian Positive School and had been invited to Buenos Aires to give a series of conferences following his successful cycle of lessons on the history of Rome at the *Collège de France* during which he met Emilio Mitre, owner of the popular Argentine daily *La Nación* and his future host.

During that inter-continental itinerary, the Italian scholar went first to Brazil, then Uruguay and finally Argentina. She noted down her impressions in a sort of travel journal, which she had published in October 1908, printed by the Fratelli Treves from Milan. The book title was *Nell'America meridionale* (In South America)<sup>1</sup>. Lombroso's intention was to give her readers general information on the society and culture of those exotic places, although increasingly better known because of the presence of a few million Italian immigrants<sup>2</sup>. She dedicated the book to them, hoping to «scuotere l'opinione dell'Italia a vostro riguardo ed a rendere più facile il compito che voi avete così generosamente intrapreso di fondare laggiù in ogni angolo del mondo delle nuove Italie, il cui futuro sia così glorioso come quello della patria antica»<sup>3</sup>.

Brazil, above all, led Lombroso to comment about the beauty and variety of its nature<sup>4</sup> and the hearty welcome offered by the Italian *fazenderi* to both their fellow-countrymen. She did not avoid observations betraying the family spirit of anthropological observation on the consequences of the racial mix

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1 See LOMBROSO FERRERO (1908).

2 In 1911, 929.863 non-naturalized Italian citizens lived in Argentina alone. See DE ROSA (1988), p. 80.

3 «Direct Italy's opinion toward you and facilitate the task you have so generously undertaken to make, there, in every corner of the world, new Italies, with a future as glorious as that of your former country», LOMBROSO FERRERO (1908), p. vii (author's translation).

4 «La bellezza della natura, la profusione di questa bellezza, ecco forse l'unico elemento comune a tutto il Brasile [...]; ecco forse la differenza essenziale tra il Brasile e l'Europa», *ivi*, p. 4.

between blacks and whites and the merits and defects of the Brazilians<sup>5</sup>. The Eastern Republic of Rio Uruguay, which had long been fought over by Brazil and Argentina, was only made free and independent in 1828. Thus, to the Italian writer, it seemed proud and hard-working as well as quarrelsome and politically unstable, without however meriting any further analysis<sup>6</sup>. However it was Argentina that surprised Gina Lombroso the most. The city of Buenos Aires, which on its own reflected the entire country, seemed, in fact, to embody «la modernità recente, la giovinezza rigogliosa e spensierata della nuova Argentina [...] noi entrando in nuovo mondo, ingenuamente ci immaginiamo di dover trovare qualche cosa che segnali il fatto della distanza, magari i corali degli Indi o le capanne dei neri, mentre invece si è trasportati in una città completamente moderna ed europea»<sup>7</sup>. The author then dwelt upon the habits and customs of the 'Argentine man', his pastimes and amusements, his way of living. Her considerations became more detailed when she described the impressions she drew from her visits to the Faculty of Medicine, to the schools (where she observed the good level of education available to young girls) and the prisons. In fact she set aside a chapter for these places. In particular the *Penitenciaría nacional*, the prison in the Capital that gathered together all the prisoners from the province of Buenos Aires, caught her attention the most. The institute was even defined as «una delle più belle e complete istituzioni della Repubblica in cui tutte le qualità degli Argentini [...] sono armonicamente fuse in modo da trasformare questo luogo di pena che non è un ergastolo, né una prigione, in una vera casa di redenzione, fisica, psichica, intellettuale e morale, quale la nuova scuola l'ha concepita e quale in Italia certamente i contemporanei non vedranno mai»<sup>8</sup>. There was an office

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5 «L'elemento africano ha esercitato sul brasiliano l'influenza che ha avuto in Cina l'elemento indiano; ha ammolito un poco il bianco, ma l'ha richiamato alle gioie dei sensi dell'amore, della vista e dell'udito», *ivi*, p. 107; ancora «un'altra qualità che i Brasiliani, i quali conoscono i neri assai da vicino, attribuiscono alla loro influenza, è la bontà. Pare infatti che i negri sieno buoni, dolci, affettuosi, amanti della famiglia e dei bambini assai più che i bianchi», *ivi*, p. 109 e infine «la dote più importante del brasiliano - il più prezioso vantaggio dell'innesto col nero - è la sua immaginazione», *ivi*, p. 119.

6 See LOMBROSO FERRERO (1908), pp. 151-152.

7 «The recent modernity, the thriving and the carefree youth of the new Argentina [...] we entered a new world we naively imagined would show the fact of the distance, perhaps the corals of the Indians or the huts of the blacks; instead we were transported to a completely modern and European city», *ivi*, pp. 181-182 (author's translation).

8 «One of the most beautiful and complete institutions of the Republic in which all

annexed to the prison for the forensic police, which was run at that time by Dr. José Ingenieros. There, he studied the latest arrivals from a physical and moral point of view and collected data kept in personal files for each of them<sup>9</sup>. There followed a description of the regulations and the places, and with a certain amount of emotion, Lombroso quoted her dialogue with the Director, Dr. Ballvé, who made her observe the care with which they respected all the precepts that the guest's father had dictated: «e mi veniva un nodo alla gola, all'idea che egli fosse così lontano e non potesse venire, che egli dovesse continuare a vivere in un paese che gli è sempre così ingrato»<sup>10</sup>. The old saying of *nemo propheta in patria* (no prophet is respected in his own land) perfectly suited the observations made by Gina Lombroso, which gave back the image of a country which was a lot more advanced in its practical and applicatory results as regards criminal anthropology. Another example to confirm this was offered by the mental hospital in the city. It was built on the English open door model and was excellently managed by Prof. Cabred.

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the qualities of the Argentines [...] are harmoniously melted together so as to transform this place of punishment, which is neither a prison nor a jail, into a true and proper physical, psychical, intellectual and moral house of redemption. This is just as the New School conceived of it and just as our contemporaries in Italy the will never see», LOMBROSO FERRERO (1908), p. 182 (author's translation).

9 Gina Lombroso, continuing the narration of the prisoners' lives, described a penitentiary system that scrupulously enacted Foucault's disciplinary system in the description of the major penitentiaries of the XIX century. Each criminal detained in the *Penitenciaría nacional* had a corresponding 'book' in which was noted all the information useful for description of his personality and the type of conduct during incarceration. The behavior of prisoners, judged by a *Court of Conduct* formed by the chaplain, the director of the institute, and the mayor of Buenos Aires, included upward and downward movement in a pyramidal 'ranking'; the reward for the most virtuous, according to the Italian scholar, consisted of being called by name and treated as 'normal men'. In addition to building hierarchies useful for control according to the dual system of gratification-sanction, the words Lombroso often wrote about the work in the Argentine prison and the effects this produced, recalled what Foucault wrote about the compulsory work of the prisoners in an anti-laborer role. In the *Penitenciaría nacional* of Buenos Aires, work was obligatory and had reached such productive excellence in both quality and quantity, that «vi sono sempre richieste giacenti all'amministrazione molte più richieste di lavoratori di quanti operai la *Penitenciaría* possa dare», *ivi*, p. 225.

10 «I had a lump in my throat, at the very idea that he was so far away and could not come, that he had to continue to live in a country that was always so ungrateful towards him», *ivi*, p. 230 (author's translation).

The penitentiary institutions and the mental hospitals were thus picked out by the founder of criminal anthropology as tangible signs of the spread of her father's ideas. However her analysis does not go beyond this. The university courses in the Faculties of Jurisprudence and Medicine were not taken into account, nor were the monographic publications or the periodicals. Thus the academic context and research, which were certainly just as important, were only in the background. Gina Lombroso's biography and writings made her become an affirmed scientist to be included in the ranks of Positivism<sup>11</sup> and do not leave any doubt that what she omitted was due to her scarce knowledge or interest for the scientific movement of the country where she was a guest. Instead it is likely that she would have preferred to talk about the definite results of positive science since its scientific spread and efficiency in conditioning the Argentine penal legislation were, and are still so even today, controversial and talked about problems.

If, in fact, the containing structures for the condemned people and the dangerous alienated ones were managed by supporters following the ideas present in Italian criminal anthropology, and thus were equipped and managed trying to follow their proposals, in other environments, instead, the same favour, as professed by the penalists and by politicians, did not succeed in obtaining the same efficiency. Doctors, judges, lawyers and university professors showed a good level of organization but were not able to propose what direction to take or what political intervention to follow with respect to the recent problems, even if they had already been noticed, which derived from the massive immigration and the increase in crime.

The year 1887 is usually considered the beginning of Argentine criminology, since two fundamental events took place within a few months of each other there. On 16<sup>th</sup> May the lawyer Norberto Piñero became the Professor of Penal Law in Buenos Aires and officially declared his adherence to Positivism<sup>12</sup>. A little while afterward Osvaldo Magnasco published his doctoral thesis, *Sistema de derecho penal actual*, in which he said he was against the classical school<sup>13</sup>. The study of criminal anthropology received even more of an impulse thanks to another two lawyers: José M. Cantilo together with Luis

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11 Cfr. DOLZA (1990). On the relationship between Gina Lombroso and the United States of America, see PETIT (2007).

12 CREAZZO (2007), p. 41.

13 MAGNASCO (1887).

María Drago<sup>14</sup> who, in fact, in 1888 helped to found the *Sociedad de Antropología Jurídica*. Indeed, their headquarters soon became the meeting place for many more eminent personalities of the new scientific current. These personalities included Norberto Piñero himself, the jurists Rodolfo Rivarola, Francisco Pico and José Nicolás Matienzo who was Professor of Penal Law, the doctor and Professor of Nervous Pathologies José María Ramos Mejía, and even its president Francisco Ramos Mejía. If the influence of Italian Positivism in Argentina did not succeed in making inroads on the penal code that had been approved, according to classical theory, precisely in 1887, not even afterwards would any great impact be seen on the South American country's criminal regulations.

Drago himself, in 1888 with his famous *Los hombres de presa*<sup>15</sup>, urged the governmental authorities to act following the directives of penal positivism to contain the growing increase in crimes and pointed out a very dangerous criminal expansion due (besides the uncontrolled immigration) above all to the Argentine penal system<sup>16</sup>, which was not judged capable of adequately

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14 «Uno de los partidarios de la escuela positiva más comprometido con la línea antropológica» by Enrique E. Marí which also explains how, along with Antonio Piñero, Arturo Ameghino, Rodolfo Moreno, Francisco Pico and others, he formed a subgroup in criminal anthropology in Argentina that observed crime as an expression of unmodifiable natural laws and proposed eliminative penalties for born criminals, placing criminal science «a la altura de Lombroso, de Puglia y de Lacassagne», MARÍ (1985), p. 197. Good evidence of this attitude can be traced to the conference by Ramos Mejía at the anthropological society and later published by the press *El Censor*: RAMOS MEJÍA (1888).

15 DRAGO (1888). This text was destined for rapid international success, due in particular to the enthusiasm it aroused in an exceptional reader: Cesare Lombroso had it translated and published by the Italian press of the 'school' of the Turinese Bocca, adding to his prestigious preface that of prof. F. Ramos Mejía, defining as extraordinary the spread of new ideas in Argentina: see DRAGO (1890).

16 Confirming Drago's real objective was the thorny question of the analogy (or not) between criminals and the alienated, was resolved thus: «Cualquiera que sea, no obstante, la conclusión a que se llegue en la difícil controversia, ella no puede hacer variar la base inmovible en que se asienta la ciencia represiva. Si el delincuente no constituye una entidad patológica y es más bien un inválido moral, como sería inválido y no enfermo el individuo que por conformación careciera de dedos en una mano, por más que no pudiera ejercitar acto alguno de prehensión, no por eso se desconocerá en él una inferioridad de naturaleza, como incidentalmente lo ha notado Herbert Spencer en una de sus obras, ni dejará de representar un peligro contra el cual el Estado tiene el deber y el derecho de defenderse. Dentro del criterio filosófico, la sociedad no castiga el delito, según la vieja

fulfilling its repressive function. When he became Foreign Minister in 1902, he did not commit himself to the reforms previously requested (limited to relationships with other South American countries).

In any case, underlining the consistent increase in crime was valuable, above all, with regard to the repressive activity of the State thanks to a police reform that took place between 1888 and 1889<sup>17</sup> and the publication of the new *Código de Procedimientos en Materia Penal para el Fuero Federal y Tribunales Ordinarios de la Capital y de los Territorios Nacionales* (Criminal Procedures Code in Penal Matters for the Federal and General Courts of the Capital and National Territories) law 2372 of 17<sup>th</sup> October 1888 (which, however, left unaltered the procedural regulations at a provincial level)<sup>18</sup>, where huge space was given over to police prevention activity.

An excellent chance to have an effect on the penal order came about with the opening of the work through the 1887 Código Tejedor reform. On 7<sup>th</sup> June 1890, in fact, President Celman's decree was the starting point for a reform which intentionally named three criminalists who were clearly positivist in their way of thinking<sup>19</sup>. The three in question were Norberto Piñero, Rivarola

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concepción de los teólogos, como no premia oficialmente la virtud, sino que, con la pena, imposibilita o hace más difíciles los ataques de los degenerados y de los perversos. Las reclusiones carcelarias, como las cuarentenas, como los secuestros y aislamientos en los casos de epidemia, obedecen a un mismo principio y se informan en un motivo análogo: la necesidad de la defensa colectiva», DRAGO (1921), p. 65.

17 The year 1888 saw the reform of *Edictos Policiales*, which established a new hierarchical scale. The *Guardia de Caballería* (Cavalry Guard) was created, and in March of 1889 the new *Departamento de Policía* (Police Department) was founded. The next year, led by police Lieutenant Colonel Alberto Dellepiane, the *Policía de Capital* went from keeping the *Registro de L. C. (ladrones conocidos, known criminals)* containing photographs of criminals having been found guilty at least twice for crimes against property, to the Bertillon identification system thanks to medical official Dr. Agustín Drago. On 3 April 1889 the *Oficina de Identificación Antropométrica* (Anthropometric Identification Office) was opened, with Dr. Drago as its director.

18 For a judgment on the text of 1888 and brief historic summary of the draft reform of the procedural codes, see LEVENE (1975).

19 The government formalized the reasons for the need for form in three points: «Que, según lo ha comprobado el estudio y la jurisprudencia de los tribunales, el código penal vigente adolece defectos que es indispensable hacer desaparecer, por los peligros que entraña para la sociedad, y para los que sufren especialmente su aplicación» (1); «Que en los últimos años, diversos países han alterado su legislación penal, dictando sus códigos como resultado de estudios minuciosos y completos que deben tomarse en cuen-



himself, and José Nicolás Matienzo. The three of them all belonged to *Sociedad de Antropología Jurídica*.

The duties taken up by the three positivist criminalists aroused interest as regards the legislative progress in Argentina, of Lombroso's 'Archives' which published a long article on the project before the end of 1901 and which was edited by Scipio Sighele. It must be noted that this interest had been almost non-existent up to then. This article pointed out three points which seemed to support the Positive School, i.e. repairing the civil damage to the victims of these crimes, the judge being obliged to order the person who committed the crime to be sent to a mental hospital, and discipline of the habitual offender<sup>20</sup>.

The legislative commission of the House of Deputies studied the project and in 1895 asked Piñero to help them. However, his approval did not arrive and a new commission was set up. This commission, in 1900, decided to reform the 1887 code by integrating into it 105 articles which dealt with the previous work of the positive criminalists.

This winding reform path ended by approval, on 22<sup>nd</sup> August 1903, of law number 4189. However, many people thought it worsened the existing situation, and it was heavily criticized, both for the method used and for its general impact, as it was considered too repressive<sup>21</sup>.

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*ta; y que la ciencia penal se ha enriquecido con nuevas doctrinas que, si bien son objeto de discusión y no se imponen desde ya como verdades inconcusas, deben tomarse en consideración para aceptar de ellas lo que pudiera importar un progreso para nuestra legislación"» (2); «Que, además de las deficiencias apuntadas, existen vacíos que las legislaciones modernas han previsto en sus disposiciones, vacíos que es menester llenar por el carácter mismo de las leyes penales que no deben dejar impunes ciertos hechos criminosos omitidos en sus disposiciones y que pueden ser de gravedad tal, que comprometan las relaciones internacionales» (3). See RODRIGUEZ DE LA TORRE (1917), p. 216. Emphasis is mine.*

20 See SIGHELE (1892).

21 A comprehensive judgment on the method with which the law was conceived and on its content is derived from the report presented by the *Comisión de Códigos al Senado* (Senate Codes Committee) of 1920: «En 1903 fue sancionada la Ley 4189, o Ley de Reformas al Código Penal, que tomó algunas disposiciones del proyecto de 1891, pero sin método ni espíritu científico. Alguien la ha calificado de ley anacrónica, porque no respondía en realidad a las nuevas orientaciones del derecho penal. Empeoró el Código y no obstante su rigor para la represión de ciertos delitos, no impidió el aumento de la delincuencia. Al poco tiempo de promulgada dio lugar a críticas bien fundadas. Sobre todo por su pensamiento simplista – como se ha dicho con razón – de aumentar las penas, en la creencia errónea de que el crimen se atenúa con la mayor severidad en el régimen represivo», *Diario de Sesiones de la Cámara de Senadores*, Congreso Nacional (Ed.), Buenos Ai-

In December 1904, Quintana, the President of the Republic, nominated a new commission which was completely positivist. This commission was to revise both the penal code and the procedure in the Capital. This was perhaps the most advanced moment in the hegemony of penal positivism in Argentina. In fact the jurists Rodolfo Rivarola, Cornelio Moyano Gacitúa, Francisco Beazley<sup>22</sup>, Norberto Piñero and Diego Saavedra were called upon to take part in this revision work. Surprisingly, the powerful doctor José María Ramos Mejía was added to the aforementioned group while the secretary was José Luis Duffy, the director of the *Cárcel de Encausados*.

The commission, which was wholly orientated towards positivism, truly received more complete and articulated duties with regard to their previous commissions. These duties involved the uniting of penal norms and greater harmonization of the regulations of substantial penal law as opposed to the inhomogeneous norms that regulated procedures in the various provinces.

On 10<sup>th</sup> March 1906, the Commission presented its project. Right from the *exposición de motivos* (expression of grounds) the members of the Commission announced that they «penetrados de que un Código Penal no es el sitio aparente para ensayos de teorías más o menos seductoras, han renunciado deliberadamente, y desde el primer momento, a toda innovación que no esté abonada por una experiencia bien comprobada y que, cuando han adoptado alguna, en estas condiciones, no se han preocupado de averiguar si ella se debe a la iniciativa de los clásicos o de los positivistas», and went on speaking more explicitly about the relationship between the regulations they had come up with and the general theories which supported them: «las preocupaciones de escuela, las discusiones teóricas, las disquisiciones académicas, no han tenido cabida en el seno de la comisión, y cualesquiera que fueren las opiniones personales de sus miembros sobre tópicos determinados de la ciencia penal, todos han estado de acuerdo en que no era la oportunidad de sostenerlas, porque queríamos que una obra común que resultara libre de todo espíritu sectario y constityese una zona franca, a cubierto de cualqui-

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res, 1920, p. 937. Also see the opinion of positivist José Peco: «Antes acrecía que disminuía los defectos del Código Penal. Las reformas introducidas, no se avenían con el espíritu asaz conservador del Código. Respondían a otros principios. Además no llenaba alguna lacuna, ni consagraba la unidad penal, ni incorporaba nuevas instituciones jurídicas, ni depuraba graves errores», reported in LEVAGGI (1977), pp. 196-197.

22 Francisco Julián Beazley, an attorney already in charge of the Buenos Aires police, implemented the use of Vucetich's fingerprinting system.

er reproche de exclusivismo»<sup>23</sup>. Thus free from the prejudice of the schools and only interested in responding to the needs of the country and its general aspirations, the commissioners concentrated on the following *bases fundamentales*, i.e. the unification of the existing penal laws in the Republic, the adoption of some modern institutions known for efficiency in punishing or correcting, the simplification of the penal system, substituting the gaps and deficiencies and the re-ordering the different topics into a more logical form.

Based on these premises it is easy to imagine that the greatest effort of the 1906 commission was toward a rationalization of the regulatory system that, on adopting the criteria of positive science, considered still without acceptable experimentation. In fact, a project that was still substantially liberal began, intended, in its special part, to slightly reform the punishment system. With regard to the peculiar themes of the positivist discourse, furthermore, individual responsibility was maintained as a cornerstone of imputability, judging the generic term of ‘estado de enajenación mental’ (mental incapacity) was to be preferred when defining the multiple possible causes of irresponsibility<sup>24</sup>. The idea of the individualization of the penalty was resolved according to the classic system of attenuating and aggravating circumstances, or even by taking into account the criminal intention; that recalled the moral responsibility of the agent rather than the social danger.

It is possible that the positivist turning-point was missed due not only to ‘internal’ character reasons such as the necessity to face up to a primal modernization of the penal system, but also to the commission’s scarce innovative

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23 «Understanding that a Criminal Code is not the obvious place for demonstrating more or less attractive theories, they deliberately avoided, from the first moment, any innovation that was not gained from well-proven experience and, when they did adopt a theory, in these conditions, they were not concerned with determining whether it owed its initiative to the classicists or the positivists»; «scholastic concerns, theoretical discussions, and academic digressions had no place within the commission, and whatever the personal opinions of its members on specific topics of criminal science, they all agreed that this was not the occasion to air them, because we wanted our common work to be free of sectarianism, a neutral space untainted by any claim of exclusivism», see LEVAGGI (1977), p. 198 (author’s translation).

24 Cf. art. 41, inc. 1: «Se exime la responsabilidad al que ha resuelto y ejecutado el hecho en un estado de enajenación mental cualquiera, no imputable al agente». For comparison, see the discussion of the same argument by classicists and positivists in the Italian parliament and scientific journals ‘of the school’ at the time of discussion on art. 46 of the Codice Zanardelli, see DEZZA (1991).

force. Rivarola did not side convincingly with positivism<sup>25</sup> and Piñero was not able to produce a single work that could be attributed to criminalistic science, then Ramos Mejía alone would not be able to impose his positions, being forced into a subordinate position as a doctor who was not very competent in law. Besides, with Duve there would be added at least three other reflections which do not regard the theoretical profile of the authors of the project, but which keep to deeper socio-political elements. On the one hand, in fact, to justify the prudence of these men in 1906 it is valid to recall the compilers of the 1890 project. The problems as regards the increase in criminal acts and the continuation of the extraordinary migratory flow, with millions of European workmen moving to South America; they could not be dealt with by an experimental order, but instead, exceptional repressive interventions were used. On the other hand, the very institutional structure of the fragile federalism of the country, which celebrated its 100 years of Independence in 1910, was an obstacle to practical application of those ideas. Instead, these inspired sectors less exposed with respect to the judicial power, such as police and mental hospitals. The provincial courts of justice, even if they were willing in some cases to direct their decisions in a positivist direction, often saw their decisions revoked by the *Cámara de Apelación*<sup>26</sup>. Finally the federal system also conditioned the drafting of further projects until the 1921 code since it made the trial system inhomogeneous and, because the provinces had been assigned the task of carrying out the sentence, and the various conditions of the prisons themselves hindered making penalties specific<sup>27</sup>.

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25 Also see Levaggi's various opinions: «Lo cierto es que, aun cuando no haya, en efecto, compartido la filosofía positivista, fue un convencido de la necesidad de llevar al derecho penal el método empírico propiciado por esa escuela», in LEVAGGI (2009), p. 762 nt. 17.

26 Thomas Duve also recalls that Octavio Bunge presented the jurisprudence of the time as connected with the classic school, Cf. DUVE (1999), p. 147.

27 In this sense, the words of Luis Vicente Varela in 1918 are of interest: «rancias ideas de federalismo, inexplicables en esta materia y en este tiempo, son las que hano obstado al estudio y sanción de los proyectos», see *ivi*, p. 149.

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## Chapter VII

### Stories of Law and Cinema





# HISTORY OF ROME, HISTORY OF ROMAN LAW AND CINEMA

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## 1. *Introduction*

Studies regarding the relationship between classics and movies have become, lately, a prominent field in the study of classics' reception and interpretation in modern culture<sup>1</sup>. Representation, spectacularization and sophistication of the ancient world have been made object of various publications, reviews, articles, studies and seminars in which historians, or other scholars, try to draw a line, when possible, between historical truths and contemporary misinterpretations or reinventions regarding social, political, juridical and linguistic aspects of antiquity.

This is why, whenever a pop product (such as movie, television series, book, videogame) shows scenarios or traces of the ancient world, authors often ask for the help of professional classicists that would serve as academic consultants, whose contribution results in the addition of some scientific erudition to their production. Of course, this kind of interactions between filmmakers and scholars is more evident when it comes to movies and tv-series, in which the aesthetic and theatrical component is crucial and could determine the success or the failure of the product. The need to create something visually attractive and entertaining, on one hand, and the search for historical accuracy, on the other, could make this relationship between the movie industry and academies frustrating, humorous or rather self-aggrandizing.

Kathleen Coleman, Harvard professor of classics and famous academic consultant you will grow familiar with in this essay, said that «Scholars are, of course, notorious for being obsessed with detail – but detail is repository of authenticity»<sup>2</sup>. Sometimes, this kind of care and attention may contrast with the popular culture's view that we have of ancient Rome, often depicted as a uniquely flexible myth that can be shaped depending on the purpose of the screenwriters.

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<sup>1</sup> DALL'ASTA, BERTELLINI (2000), pp. 300 ss.; MALAMUD (2008); SOLOMON (2001); WYKE (1997); POMEROY (2017).

<sup>2</sup> COLEMAN (2004), p. 45.

As Coleman says, «The Rome Hollywood created is now the only Rome that is universally familiar<sup>3</sup>», along with the image given by other media, like computer games (such as *Rome: Total War*, *Shadow of Rome*, *Gladiator – Sword of Vengeance*, etc.) and novels or sagas – especially thrillers and procedurals – set in ancient Rome.

But what makes ancient Rome so special for the Hollywood industry? Why such diverse interpretations on Roman history, politics and laws? What does it mean to be an academic consultant and what kind of studies and trainings do these professionals have?

In this essay, I try to examine these aspects and maybe find some answers, which may turn out to be surprisingly determinant for contemporaries rather than ancient Rome historians and scholars.

## 2. *The Gladiator case*

First of all, we need to consider that all the different interpretations that are given of our Roman ancestors' lives and adventures come from the fact that Rome is the single most important culture in the development of the Western civilization, whose charm is very strong for moderns.

Jonathan Stamp, distinguished scholar and expert of ancient Rome documentaries, who also worked as historical consultant for the HBO series *Rome* in 2004, argued that «The best, most powerful myths are the ones that can stand for different things at different times. Rome remains our top-dog myth because it stood for completely different things»<sup>4</sup>. This definition, in its complexity, is not very different from the one given by Quintilian in his *Institutio Oratoria*, in which, saying «Satura quidem tota nostra est» (10,1,93), the author recognises that lots of the most relevant intellectual activities were delivered by Greeks. But when it came to politics, law and wars, ancient Romans were second to none and perhaps this is the first aspect that mostly fascinates the modern audience and that is used to deliver through media, with the support of classics' reinterpretations, new ideas and trends<sup>5</sup>.

3 COLEMAN (2004), p. 46.

4 As reported in WINNER (2005).

5 In MEDINA LASANSKY (2014), p. 140, it is said, referring mainly to *Quo Vadis*, *The Robe*, *Ben Hur*, *Spartacus* and *Cleopatra* that «these pop-culture representations of the ancient world have recently received legitimacy as an object of scholarly study by both classicists and film historians. In their introduction to *Imperial Projections: Ancient Rome in Modern Popular Culture*, the editors write of the success of the more recent film *Gladiator*

That being said, the responsibility of academic consultants is undeniable, since it is thanks to their job that media producers can give life to their personal views of the past.

Anyways, before discussing the pros and cons of being an academic consultant, I think it is time to examine a specific and very famous case that could let us understand how the Hollywood industry usually handles its dialogue with academics and how all this affects products and the perceptions that masses have over them.

The movie I am about to pick is a very famous one, that I am sure most of the people of this distinguished audience have seen once in their lives or have at least heard of: *The Gladiator*.

Even if it is unlikely that the reader doesn't know it, the *Gladiator* is a 2000 movie by director Ridley Scott, featuring Russell Crowe in the role of General Maximus, who conquers Germanic warriors and would be named heir to the power of Marcus Aurelius. The emperor's son, Commodus, murders the old man and Maximus' family, with the main character being sold into slavery. He gets a gladiator training and is shipped back to Rome to fight in the Colosseum.

The script is by John Logan, William Nicholson and David Franzoni, and comes from Franzoni's idea.

While working on the script, of course the screenwriters at Dreamworks decided they would require the help of an academic consultant and decided to come in contact with Kathleen Coleman, professor of Latin at Harvard since 1998 and author of two different contributions regarding today's topic: *Fatal Charades: Roman Executions Staged as Mythological Enactments*<sup>6</sup> and *The Pedant Goes to Hollywood: The Role of the Academic Consultant*<sup>7</sup>. As you could easily understand approaching the titles of these two articles, Professor Coleman's experience with the *Gladiator* was not as pacific and good as one may think. In one of her articles, she reported that one message from the production office said «Kathy, we need to get a piece of evidence which proves that women gladiators had sharpened razor blades attached to their nipples.

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(2000) whose «(...) advertising campaign, and the film itself, instance the experience of ancient Rome available to most Americans and Europeans in the twentieth century. They receive their principle [sic] contact with the ancient world through popular culture in its diverse manifestations: films and television programs, historical novels and plays, comic books and toys, advertising and computer games (Joshel et al. 2001: 1)».

6 COLEMAN (1990), pp. 44 ss.

7 As note above.

Could you have it by lunchtime?». This tells us that historical and political accuracy was not exactly the priority in the movie, along with other, we would say, ‘cinematic licenses’, like the fact that gladiators are depicted as versatile characters, a kind of mix between *gladiatores* and *venatores*. The truth was that an axe man would not be able to fight with a sword and vice versa, but Russell Crowe does both in the movie. The sources for this kind of ideas were not exactly ancient Roman texts, but modern fantasies.

Scott took the idea for the movie when he saw a picture painted in 1872 by the French artist Jean-Leon Gerome. The picture, *Pollice Verso* (Thumbs Down), shows a gladiator in the arena standing with his foot on the throat of a rival as the crowd urges him to kill. For his story, Scott drew heavily on previous movies such as *The Fall of the Roman Empire*, *Spartacus* and *Ben-Hur*. For example, for the scene in which emperor Commodus enters Rome, Scott used a shot-for-shot pastiche of Leni Riefenstahl’s 1935 Nazi epic *Triumph des Willens*. This is one of the arguments that critics referred to when accusing Scott of using fascistic references himself, but he stated that it was the Nazis that copied the Romans.

All these interventions have changed the image of Rome, making it ‘unfaithful’ to its original version but also easier to understand by moderns: «Close your eyes and picture ancient Rome. What do you see? Eagles, gladiators and white togas, no doubt. Hillsides covered with classical, ivory-coloured temples too, probably. Straight lines. Huge crowds. Forests of gleaming white marble columns and statues. A place glowing with what Olivier in *Spartacus* called “the might, the majesty, the terror of Rome”»<sup>8</sup>.

In the end, Professor Coleman was disappointed with how ancient Rome and politics had been sophisticated in the *Gladiator*. She said «This is not a true story about Commodus. But I mean, a lot of the atmosphere was designed to reflect upon modern America, I understand. And it’s really about our modern culture rather than about Roman culture». This is why she asked for her name to be removed from the credits, in fact she is just present in the thanks tag at the end of them.

### 3. *Ancient Rome and Hollywood: accuracy vs. spectacularization*

So, was Professor Coleman’s contribution helpful – indeed – in the development of the *Gladiator*? And is the academic consultant really an impor-

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8 WINNER (2005).

tant figure when it comes to mere consultancy? As she said, ancient Rome is often used as a metaphor for modern civilizations, but the *Gladiator* was not the first example of this.

*Ben-Hur* (the 1907 first adaptation of the 1880 Lew Wallace's novel *Ben-Hur: A Tale of the Christ*), which was one of the most eloquent expressions of the neo-classical movement, was not just a movie, but also a mass-phenomenon, that needed to be adapted to 'modern' necessities and could not be only a faithful replica of 'almost precise' historical references contained in the book<sup>9</sup>. That is the main reason why it drew its look from several novels, plays, and paintings by the likes of Lawrence Alma-Tadema<sup>10</sup>. From then, Italian and American directors started influencing each other, and over the decades the looks for cities, clothes, temples and political reconstructions of ancient Rome became standardized. It has been noted that «Italian productions led the way, with *Quo Vadis* (1912), *Cabiria* (1914), and *Theodora* (1921) introducing many of the features listed by Juan Antonio Ramirez as traditionally associated with screen depictions of the ancient world. The colossal sets of D. W. Griffith's *Intolerance* (1916) demonstrated that the United States did not lag behind Italy in producing spectacles set in the ancient world, and movie after movie followed throughout the silent era»<sup>11</sup>. The excesses of a colorful, perfect, spotlessly clean and symmetric Rome ended up to *Cleopatra* (1963) and *The Fall of the Roman Empire* (1964), the latter being shot outside of Madrid, with a *Forum* that was four times the size of the original in Rome<sup>12</sup>.

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9 SOLOMON (2016), pp. 1 ss.

10 WINNER (2005).

11 MAURICE (2016), p. 111. See also O'BRIEN (1993), p. 158: «It was as close as movies got to a cultural lineage, this process of spirals within spirals by which you got the myth (the real, original Italian epics, *Cabiria* and *Quo Vadis* and *The Fall of Troy*, that took America by storm in 1914) and the myth of the myth (the improved and homogenised American epics, *Intolerance* and *Ben-Hur* and *The Queen of Sheba*, which in turn found their way back to Italian screens) and then, beyond computing, the myths of the myths of the myths, as each photographed the others' photographs».

12 See DiMARE (2011), p. 892: «The image of world empire also pervades Roman-era films, despite the generally negative cinematic image of ancient Rome. Prologues to *Quo Vadis* and *Spartacus* pointedly expound upon Roman glory and prosperity before denouncing Roman tyranny. The Roman Messala (*Ben-Hur*, 1959), admittedly a chauvinistic thug, is nonetheless correct when he boasts of the Empire's order, roads, and trade; the epic chariot race depicted later in the film highlights the Empire's diversity. Even the Judean rebels in *Life of Brian* (1979) compose an awkwardly long list of benefits derived from Roman rule. The most celebratory vision of Pax Romana is in *Fall of the Roman Em-*

So is there any place for authenticity in Hollywood productions regarding ancient Rome? Is there any place left for academic counsellors when it comes to advising and even taking important decisions about the dos and don'ts in a cinematic production? Taking example from the bad critics received by *Cleopatra* and *The Fall of the Roman Empire*, regarding the historical and visual unreliability of the image that was given of Rome as a city and of its history, Richard Lester came up with *A Funny Thing Happened on the Way to the Forum* (1966): «Wanting to replace these elements with authentic historical reality, Lester, together with production and costume designer Tony Walton, produced film sets that for the first time depicted the grime and tattiness of the ancient world, complete with peeling paint, cracked tiles, and rotting fruit covered in flies»<sup>13</sup>. Even if *A Funny Thing Happened on the Way to the Forum* can be considered an isolated case, something different was destined to happen on the small screen.

After early tries with *Up Pompeii* (1969-1970) and *I, Claudius* (1976), the most modern and reliable example of historical fidelity (or at least a good try) is given by the tv series *Rome*, which aired in 2005-2007 and was co-produced by Italian's Rai and America's TV giant HBO. Those two networks joined forces and shot an epic \$100m television drama series which aimed at redeeming Hollywood's shallow and superficial approach towards antiquity, both visually and historically.

Rome looks astonishing, but also weird, because this Rome is more decadent than grandiose. Its temples don't shimmer but are dirty and multi-coloured. «The set is smoky and covered with Latin graffiti, much of it obscene. On street corners there are candle-strewn shrines and drawings of giant penises. In one street there's a typical Roman toilet: a latrine with planks with holes where men and women sit side by side and use the same fetid sponge as toilet paper. Grass grows between the flagstones on the Via Sacra. There's mud everywhere. Welcome to the new, realist, 'authentic' Rome: feral, vivid, jumbled, irregular»<sup>14</sup>. This 'third world Rome' is the 'anti-HollyRome', as

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*pire*. Marcus Aurelius's speech to a diverse gathering of governors and rulers characterized the Roman Empire as a commonwealth of free nations, transcending race and religion, and even willing to embrace the barbarians. This optimistic version (soon to be shattered by Commodus), sees Rome almost as proto-United States, a nation of nations and a model for a united world».

13 MAURICE (2016), p. 114.

14 WINNER (2005).

Jonathan Stamp, historical consultant, explained<sup>15</sup>. Production designer Joseph Bennett, who built the set, says: «People think of Rome as white and cold and beautiful, powerful but distant. But based on the research, I don't think it was like that at all. If you go to Pompeii, you're struck by how garish it is, even now. The temples and sculptures were all brightly painted. Rome was like Pompeii, but much bigger. And Rome was so noisy it was impossible to sleep. It was like hell. Think of it as a combination of New York and Calcutta, with insane wealth and insane poverty. It was pretty extreme». Bruno Heller, chief writer and executive producer, said: «We are disregarding what people might have seen before, and asking: what was it actually like at this moment in history? We're trying to deal with the lives of ordinary people, the details of routine, everyday life, of unemployment, of disease. And we are trying to be very precise in the historical moment, very precise about the texture of everyday life. Everything flows from that. The Forum was about as grand as it got, but it was not, by any means, stupendous or stupefying. Once you know that the Tiber flooded regularly and the houses were constantly on fire because they were just made of wood, you know that there were fires and floods constantly. It was always smoky, grimy and dirty»<sup>16</sup>. One may think of it as an achievement, or at least as a step forward in changing the imaginary of ancient Rome from shiny to grimy, the second adjective being more realistic.

But, on the other hand, we have to consider that, in some way, the work that modern pop culture makes over the historical accounts of Rome that academics have as paradigms of truth (using modern images and symbols to make the public understand with current visual language the main aspects of what has been) is not much different from what ancient historians did when they 'exaggerated' historical events to make them more interesting for readers.

It means we have to take into account that the tension between the portrayal of Rome in movies and the history that we know of it, is the same between what really happened in ancient times and what ancient authors wrote about it. As the historian Robert A. Rosenstone noted<sup>17</sup>, academic historians who criticise films, do not consider that even history is shaped by conventions of language.

Even ancient scholars knew that the 'sensational Hellenistic historiogra-

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15 MAURICE (2016), p. 115.

16 All as quoted in WINNER (2005).

17 BEARD (2007), pp. 5 ss.



phy' had highly influenced the account of real historical events that was given in the past<sup>18</sup>. In the end, the main issue is that, as Rosenstone argued, few filmmakers are trained historians and few historians are trained filmmakers.

And there is also an important problem regarding the training of American academics involved in the movie industry. American universities label as 'Department of Classics' a huge complex of knowledge that in Europe is spread between Roman Law, History of Roman Law, History of Rome, Classics, which means that it is highly unlikely that an American academic is trained enough to sustain the weight of such a vast knowledge: something needs to be sacrificed. This is what Robert Gurval, teacher of Classics at UCLA, argued in his seminar called *The Hollywood Myth of Ancient Rome*. «Both the historical consultant and filmmaker produce an interpretation of the past that aligns just enough with historical reality as it does with popular imagination»<sup>19</sup>.

#### 4. Conclusions

What is the future of the ancient image of Rome? Is it destined to succumb to the world of entertainment or are there any chances that, joining forces between academics and arts in general, we may find a new way to educate and entertain modern generations?

On one hand, Hollywood created its own view: Rome the pale, the pristine, the venerable is an image as old as film itself. And because we get our view of Rome primarily from the movies, the myth lies at the core of our sense of antiquity, of our sense of history, perhaps even of ourselves<sup>20</sup>. On the other, academics still fight to preserve ancient values, accounts and knowledge from

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18 As observed in GAERTNER, HAUSBURG (2013), pp. 150 ss.: «Already the first Roman historian Fabius Pictor gave an account of Rome's foundation that was heavily influenced by Hellenistic historiography and has rightly been called a "pure drama in prose". Later historians of the second and first centuries B. C. such as Coelius Antipater, Claudius Quadrigarius, Valerius Antias, Cornelius Sisenna, and others likewise succumbed to the temptation of fashioning their narratives in a sensational or 'tragic' manner. Just as their Hellenistic predecessors, they showed a keen interest in novelesque episodes and sexual scandals, dreams and prodigies, botanical and other paradoxa, dramatic duels and *Einzelszenen*, and graphic depictions of physical torture, mutilation, or emotions. Moreover, they often explained striking events by divine interventions and drew connections between arrogance or a lack of religious observance and unexpected reversals of fortune».

19 KADRIČ (2016).

20 See MEDINA LASANSKY (2014), p. 158; GOLD BOYUM, SCOTT (1971).



this popular contamination, trying to defend the so-called authenticity of classics in the repository of their libraries. Filmmakers will still fight for their right to reboot Rome, and academics will still criticise modern arts for being too creative in spite of historical reliability. In the end, the public knows the truth but is still okay with it, just like they accept that dinosaurs were covered in feathers but the ones portrayed in the *Jurassic Park* movies are not.

So I would conclude saying that from a great power come great responsibilities. Academic consultants, on one hand, should keep in mind that history and historical heritage are important but their vision is not univocal: just the product of interpretation. Filmmakers, on the other hand, need to remind themselves that the past is a product of history, far greater and more permanent than movies themselves. I will leave the end of this essay to the words of Oscar Wilde, who once said that «All art is at once surface and symbol. Those who go beneath the surface do so at their peril. Those who read the symbol do so at their peril. It is the spectator, and not life, that art really mirrors. Diversity of opinion about a work of art shows that the work is new, complex and vital», which is completely acceptable, but he is the same one that said «all art is quite useless», and I am not sure this is the case.

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YOU CAN ONLY WRITE ONCE – RIGHTS TO AUTHORSHIP, INSPIRATION  
AND TRANSFORMATION IN THE CHOSEN JUDGEMENTS  
OF THE U.S. COURTS INVOLVING THE COPYRIGHTS  
ON THE JAMES BOND CHARACTER

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Although at first glance law and arts do not seem to have not much in common, in fact there is a significant research field in the combination of both. The first important one is constituted by the observation of how the functioning of law is presented in the works of art, which is most likely depicted within 'law and literature' studies. Another one, which would be analysed within this article, is the scope of legal protection offered by copyright law, which is, however, available only upon positive effect of the analysis of artistic content from the perspective of the premises of the protective provisions.

The chosen subject of the analysis as above is undeniably a phenomenon of cinema, which strongly influenced more than half of its history. James Bond's film adventures based on novels by Ian Fleming, filmed for the first time in 1953 (*Casino Royale*) and for the last one in 2015 (*Spectre*), altogether for twenty-four times officially, with two of its series ranked among fifty best-earning movies<sup>1</sup>, deserve a prominent place as a part of film history. Though James Bond is claimed to be one of the most recognisable characters<sup>2</sup>, while its film series is regarded as most successful<sup>3</sup>, or a series of phenomenal impact on television industry<sup>4</sup>. It can be analysed not only as a source of joy and fun, and escape from everyday life<sup>5</sup>, but also because of its observation of development of global politics<sup>6</sup>, support of British national morale<sup>7</sup>, and specific attitude to women<sup>8</sup>. The character, although relative-

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1 *Skyfall* on the 18<sup>th</sup> place with app. \$ 1,1 bln and *Spectre* on the 48<sup>th</sup> place with app. \$ 0,9 bln <http://www.boxofficemojo.com/alltime/world/>.

2 HANDLER (2011), par. 2.

3 NEUENDORF, GORE, DALESSANDRO, JANSTOVA, SNYDER-SUHY (2010), p. 758.

4 MONIOT (1976), p. 25.

5 NEUENDORF, GORE, DALESSANDRO, JANSTOVA, SNYDER-SUHY (2010), p. 759.

6 RACIOPPI, TREMONTE (2014), p. 17.

7 BERBERICH (2012), p. 14.

8 NEUENDORF, GORE, DALESSANDRO, JANSTOVA, SNYDER-SUHY (2010), p. 759.

ly coherent, throughout subsequent series gradually adapts<sup>9</sup> to the current times. The scope of the latter can, however, be discussed as leading to a slow rejection of its specificity.

At the same time it must be noted that years of those movies' production involved numerous situations doubtful from the perspective of infringement of copyrights on James Bond character, which were subject to analysis in front of U.S. courts. The content of books and movies as such is certainly protected, but it is also the character of James Bond itself, independently from the work in which he is presented, that is deemed to have been a subject of copyright.

In order to establish infringement, two premises are taken into consideration<sup>10</sup>. The first is the copying of original work. From the perspective of the fictional character, which is here especially interesting, a necessary analysis regards the specificity of James Bond character. The second one is the ownership of copyright. Thus, the struggle between the successors of Ian Fleming and of the screenwriter on the scope of copyright ownership of each of them, which extended throughout most of James Bond filming history, shows the legal side of the development of the James Bond character into a symbol of modern cinema. Both of those issues will be subject to analysis in this article which on those examples will show the way of usage of legal tools to analyse art.

### *1. Subject of copyright protection from the perspective of James Bond character*

At first, however, the general scope of copyright protection in the American law must be stressed. It is, though, its regulation which will give base to the analysis of art on example of James Bond character.

To some extent the copyright in connection with other intellectual property rights is constitutionally guaranteed. Article 1 paragraph 8 clause 8 of the U.S. Constitution states that:

«[T]he Congress shall have power [...] to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries».

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9 MONIOT (1976), p. 27, RACIOPPI, TREMONTE (2014), p. 17.

10 Feist, p. 361.

The subject of the copyright protection is detailed in section 102 of the Copyright Law of the United States<sup>11</sup>, which says that:

«(a) [c]opyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories: (1) literary works; [...] (6) motion pictures and other audiovisual works; [...].

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work».

This definition of the copyrightable object bases on the concept of protection of originality, which is thoroughly described in a U.S. Supreme Court judgement in *Feist Publications Inc. v. Rural Telephone Service Company Inc.*, treated as fundamental to define this concept<sup>12</sup>. Then it is primarily named as the constitutional requirement of copyright and its *sine qua non*<sup>13</sup>, or as a source of protection of copyright<sup>14</sup>.

Such originality means that a work must have at least a minimal degree of creativity, a slight amount, at least a 'creative spark'<sup>15</sup>, or, in other words, a *de minimis* quantum of creativity<sup>16</sup>. Sometimes it is, however, still claimed that the scope of originality must not be too trivial or insignificant<sup>17</sup>. From the yet another perspective, creativity does not have to be shocking, it is enough when it is perceptible<sup>18</sup>. This demand does not necessarily mean that a protected work must be produced with a special effort<sup>19</sup>. Following this criterion, only those components of work that are original might be protected<sup>20</sup>.

The protection does not extend to the idea, or concept. This means that from the perspective of the screenplay, the sheer plot should not be protected.

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11 U.S.C. Title 17, 1976.

12 PATRY (2017), 3.II.B.§3:37.

13 *Feist*, pp. 345-346.

14 *Harper*, pp. 547-548.

15 *Feist*, p. 345.

16 *Feist*, p. 363.

17 JOYCEM, LEAFER, JASTI, OCHOA (2005), p. 469.

18 PATRY (2017), 3.II.B.§3:27.

19 *Feist*, p. 362.

20 *Feist*, p. 348; *Harper & Row*, p. 548.

At the same time, under the abovementioned criteria, presentation of the plot or specific details of its author's rendering can be subject to protection, when it is original.

When it comes to a fictional character specifically, it is undeniably an essence of the story, with whom spectators identify<sup>21</sup>. A case study followed by C. Handler shows, however, that its protection, independently from the work in which they are present, demands meeting a difficult requirement of the complexity (or scope of development) of the character, which means that such a character constitutes the story being told and is not just 'the chessmen in the game of telling story'; or in other words, is not a limited pattern and therefore more of an idea or a concept, but a unique element of expression, even when constructed from more individually unprotected patterns, which is more likely under additional graphic presentation of such a character<sup>22</sup>. The latter criterion happens to overweigh the prior, so that a character presented graphically despite being based on a simpler pattern is more likely to be protected than a more complex character deprived of such presentation<sup>23</sup>.

Also<sup>24</sup> in order to grant a copyright on a work, it must have been independently created<sup>25</sup>. It does not have to mean novelty, but it must not be copying of someone else's work<sup>26</sup>.

## 2. *The issue of prohibited copying of the James Bond character*

Based on the criteria as above, the protection of the James Bond character independently from the entire work has been analysed in two cases in front of U.S. courts, the judgements in which will be subject to study in this article.

The first case was *Metro Goldwyn Mayer Inc. v. American Honda Motor Inc. Co.*<sup>27</sup>, in which preliminary injunction in favour of the copyright holder was granted on 29<sup>th</sup> March 1995. The plaintiff argued that the infringing material of its copyright on a James Bond character was a commercial produced by the defendant which could be described as done by the court, to be read below<sup>28</sup>:

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21 HANDLER (2010), par. 2.

22 See HANDLER (2010), part. 2-5 and sourced judgments to which she referred.

23 HANDLER (2011), par. 5.

24 Those factors must exist together, see PATRY (2017), 3.II.C.§3:31.

25 Feist, p. 345.

26 Feist, p. 358.

27 *Metro Goldwyn Mayer*, p. 1287.

28 *Metro Goldwyn Mayer*, p. 1291.

«“Escape” commercial features a young, well-dressed couple in a Honda del Sol being chased by a high-tech helicopter. A grotesque villain with metal-encased arms jumps out of the helicopter onto the car’s roof, threatening harm. With a flirtatious turn to his companion, the male driver deftly releases the Honda’s detachable roof (which Defendants claim is the main feature allegedly highlighted by the commercial), sending the villain into space and effecting the couple’s speedy get-away».

Although defendant asserted that plaintiff tried to gain an unacceptable and prohibited monopoly over the ‘action/spy/police hero’ genre, plaintiff claimed distinctiveness of the James Bond adventure in: «A high-thrill chase of the ultra-cool British charmer and his beautiful and alarming sidekick by a grotesque villain in which the hero escapes through wit aided by high-tech gadgetry»<sup>29</sup>. Experts invoked by the defendant, then, provided further characteristics of James Bond as a source of a genre itself rather than a continuation of a well-known genre of spy thriller, because of its general features of: *hybridize[d] the spy thriller with the genres of adventure, comedy (particularly, social satire and slapstick*<sup>30</sup> and particular elements: *protagonist, antagonist, sexual consort, type of mission, type of exotic setting, type of mood, type of dialogue, type of music*<sup>31</sup>. Eventually the court ruled in favour of James Bond character protection in general, as *audiences do not watch [...] James Bond for the story, they watch these films to see their heroes at work. A James Bond film without James Bond is not a James Bond film*<sup>32</sup>.

In order to establish infringement particularly on the side of the defendant, particular premises must have been examined.

The first one was defendant’s access to the original work. As obvious as it may be, because of James Bond world-wide popularity giving presumption of such access, it was also proven specifically because of James Bond initial name of the commercial hero (later given up) and initial attempts to cast James Bond-type actors<sup>33</sup>.

The second one was substantial similarity test under both extrinsic and intrinsic tests. With regard to extrinsic one it was held by means of comparison that specific protected elements of James Bond are alike with the ones presented in the commercial:

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29 *Metro Goldwyn Mayer*, p. 1294.

30 *Metro Goldwyn Mayer*, p. 1294.

31 *Metro Goldwyn Mayer*, pp. 1294-1295.

32 *Metro Goldwyn Mayer*, p. 1296.

33 *Metro Goldwyn Mayer*, p. 1297.

«(1) the theme, plot, and sequence both involve the idea of a handsome hero who, along with a beautiful woman, lead a grotesque villain on a high-speed chase, the male appears calm and unruffled, there are hints of romance between the male and female, and the protagonists escape with the aid of intelligence and gadgetry;

(2) the settings both involve the idea of a high-speed chase with the villain in hot pursuit;

(3) the mood and pace of both works are fast-paced and involve hi-tech effects, with loud, exciting horn music in the background;

(4) both [...] dialogues are laced with dry wit and subtle humor;

(5) the characters of [...] man are very similar in the way they look and act – both heroes are young, tuxedo-clad, British-looking men with beautiful women in tow and grotesque villains close at hand; moreover, both men exude uncanny calm under pressure, exhibit a dry sense of humor and wit, and are attracted to, and are attractive to, their female companions»<sup>34</sup>.

The intrinsic test, however, would analyse the substantial similarity of total concept and feel, which likely took place in the circumstances of the case<sup>35</sup>.

If the infringement is established, there is still a possibility to apply a defence in a fair use doctrine. This derives from the principal goal of copyright, namely to promote learning<sup>36</sup>, encourage creativity<sup>37</sup>. Though in the American law it is strongly underlined that copyright not only serves enforcement of rights, but their balance, and ultimately serves public – not author's – rights<sup>38</sup>. Those competing rights, that are to be balanced, may be named as flow of ideas, information and commerce versus interests of author<sup>39</sup>. It could be said, though, that right to inspiration bears particular importance in literature, and possibly film as well, as new works are usually and naturally an author's input to an existing literary tradition<sup>40</sup>. The fair use defence is now codified in sec. 107 of Copyright Law, which explicitly names four factors under analysis of its application:

«(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

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34 *Metro Goldwyn Mayer*, p. 1298.

35 *Metro Goldwyn Mayer*, p. 1299.

36 PATRY (2017), 10.I.§10:1:50.

37 JOYCEM, LEAFER, JASTI, OCHOA (2005), p. 469.

38 *Harper & Row*, p. 580 see also PATRY (2017), 10.I.§10:1:50.

39 *Harper & Row*, p. 580.

40 See: R. POSNER (1998), p. 403 cited by PATRY (2017), 3.II.C.§3:31.



- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work».

Those statutory factors do not, however, mean that initially flexible tool of common law, aimed to secure copyright aims, is constrained<sup>41</sup>. The content of particular premises, thus, allows for adjusting to the specificity of the case.

Despite obvious flexibility of the work character analysis, also the substantiality should be studied in accordance with qualitative, not quantitative, nature. In *Harper & Row Publishers Inc. v. Nation Enterprises* it is clearly stated that plaintiff must show substantial amount of copying, understood qualitatively, which in particular regards affecting the work 'heart'<sup>42</sup>.

In the *Metro Goldwyn Mayer* case the fair use defence, as described above, was dismissed<sup>43</sup>. It was clearly stated by the court that, due to infringed work's own unique niche in the action film genre, the substantiality of taking therefrom could have easily been established. The kind of fictional work also demanded more copyright protection than others. Additionally, infringing work, even understood as a parody, though not meeting a parody requirement of comment on the original work, still have not ceased to be a commercial. Moreover *it is likely that James Bond's association with a low-end Honda model will threaten its value in the eyes of future upscale licensees*<sup>44</sup>. The latter comment was agreed as of particular interest<sup>45</sup>. Also the harm on the side of MGM was claimed, by conjunction with BMW as to cars used in movies and by general value of their copyrights<sup>46</sup>.

This judgement was followed by *Danjaq LLC v. Universal City Studios LLC* in which planned movie of Section 6 was successfully challenged (as denial of defendants motion to dismiss) because of infringement of James Bond character copyright. It was in particular justified by the fact that the character, theme, plot, sequence, dialogue and also even a characteristic way of introducing of Alec Duncan as 'Duncan. Alec Duncan', alike to iconic, recognizable and significant phrase of 'Bond. James Bond', were understood as

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41 PATRY (2017), 10.I.§10:1:50.

42 *Harper & Row*, p. 565.

43 *Metro Goldwyn Mayer*, pp. 1299-1301.

44 *Metro Goldwyn Mayer*, p.1300.

45 PATRY (2017), 10.V.B.§10:34.

46 *Metro Goldwyn Mayer*, p. 1301.

challenging the defendants argument of *de minimis* character of copying<sup>47</sup>. It was also established that lacking parody or commentary character of Section 6, it would be just competing James Bond movies on a spy thriller film market<sup>48</sup>.

### 3. *The ownership of the James Bond character copyright*

Also the issue of ownership of the James Bond character – as a movie one derived from the literary one – was challenged in front of the U.S. courts. But its more careful analysis cannot rather be followed without the introduction to its adjudication offered by the judge of the US Court of Appeals for the Ninth Circuit in its judgment in case *Danjaq LLC v. Sony Corp. & McClory* (2006)<sup>49</sup>:

«[E]very so often, the law shakes off its cobwebs to produce a story far too improbable even for the silver screen – too fabulous even for the world of Agent 007. This is one of those occasions, for the case before us has it all. A hero, seeking to redeem his stolen fortune. The villainous organization that stands in his way. Mystery! International intrigue! And now, not least of all, the dusty corners of the ancient law of equity.

More specifically, this case arises out of an almost forty-year dispute over the parentage and ownership of a cultural phenomenon: Bond. James Bond. We are confronted with two competing narratives, with little in common but their end-point. All agree that James Bond – the roguish British secret agent known for martinis (shaken, not stirred), narrow escapes, and a fondness for fetching paramours with risque sobriquets – is one of the great commercial successes of the modern cinema. The parties dispute, however, the source from which Agent 007 sprang».

Coming to the core of the dispute, it must be said that there were two compelling parties arguing for the authorship of James Bond character, namely Danjaq LLC. and Metro Goldwyn Mayer Inc. which derived their rights from I. Fleming and film producers H. Saltzman and A. Broccoli, against Sony Corp. and K. McClory, who was a screenwriter of *Thunderball*. The latter asserted that by means of this screenplay *the supposedly violent and alcoholic James Bond of the Fleming books [was transformed] into the movie character who is so beloved, recognizable and marketable*, and at the same time it is «the source of the “cinematic James Bond” character, as opposed to the

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47 *Danjaq* (2014), par. 4-5.

48 *Danjaq* (2014), par. 5.

49 *Danjaq* (2001), p. 947.

literary James Bond character»<sup>50</sup>. It was also this screenplay which Fleming transformed into his book *Thunderball* (to which he admitted and in 1963 settled the dispute with McClory, who also acquired exclusive rights to filming the *Thunderball* novel)<sup>51</sup>.

Next, McClory granted license to Danjaq to make movies based on his screenplay. When the license term lapsed, he challenged *Thy Spy Who Loved Me* in 1976, but eventually abandoned his activities to enjoin the release of the movie<sup>52</sup>.

Later McClory undertook further attempts against Danjaq and/or MGM, but never in form of a litigation. Though he cooperated with *Never Say Never Again* coproduced by Warner Bros. in 1983, independently from Danjaq and/or MGM, but still it was as a “*Thunderball*” remake, and its admissibility was eventually accepted by the court<sup>53</sup>. Since then never tried to execute his rights to a James Bond character.

Generally McClory’s rights to a James Bond character were never questioned, but so did their relation to Fleming’s rights. As a joint author of James Bond character (which results from his co-authored Preliminary Script Materials, along with Ian Fleming), this joint ownership regarded only the joint-derivative work of scripts based on pre-existing material (source) by Ian Fleming in form of his *First Seven Novels*<sup>54</sup>. The scope of usage of Fleming’s material is, however, doubtful. Generally it was claimed that James Bond movies are primarily using Fleming’s character, but not the plot, which was transformed by Fleming and McClory jointly<sup>55</sup>. At the same time it is questioned, whether humorous movie Bond is alike with serious literary Bond<sup>56</sup>.

Also it is worth noted, which was also invoked by the court in the *Metro Goldwyn Mayer* case, that there was a preliminary injunction against McClory in *Danjaq LLC v. Sony Corp.* (1998)<sup>57</sup>, by which, lacking consent of MGM and Danjaq, McClory in cooperation with Sony (which acquired McClory’s rights<sup>58</sup>, was not allowed to produce his own James Bond movie. As a joint

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50 *Danjaq* (2001), p. 949.

51 POLIAKOFF (2000), par. I.

52 *Danjaq* (2001), p. 949.

53 POLIAKOFF (2000), par. I.

54 *Danjaq* (1998), par. 2.

55 POLIAKOFF (2000), par. I.

56 POLIAKOFF (2000), par. IV, see also MONIOT (1976), pp. 26-7.

57 *Danjaq* (1998), *Introduction*.

58 POLIAKOFF (2000), *Introduction*.

author McClory could have used the joint work independently, but this regarded the scripts only, and only to the extent that they were not infringing Ian Fleming's rights to the pre-existing material (as scripts were a derivative work from novels)<sup>59</sup>. A new James Bond movie from McClory was therefore subject to a preliminary injunction, as identical James Bonds will create confusion, while competing James Bond films could create harm on the side of plaintiffs<sup>60</sup>.

Based on long-term knowledge on the side of McClory about the activeness of Danjaq and MGM in producing numerous James Bond movies, which were, according to McClory, infringing his rights, he undertook legal action no earlier than in 2001. This was adjudicated as failing to fall under protection because of the laches defence, which is a common law *de facto* equivalent of the civil law institution of prescription. McClory's claims, regardless of their material basis, were unreasonably delayed<sup>61</sup>, which raised evidentiary difficulties and economic prejudice on the side of potential infringer<sup>62</sup>. Also there was no willful infringement on the side of Danjaq and/or MGM, which would except laches, as the nature of McClory's copyrights were highly unclear<sup>63</sup>.

Then, based on adoption of laches doctrine in the judgment it is highly likely that in legal terms this dispute will remain unsolved. This is why artistic analysis should resolve the problem, whose is James Bond character.

The analysis of copyright claims demands not only interpretation of legal terms ruling the adequate law (including from American law perspective not only statutory law, but also an especially significant role of judicature). It regards as well the artistic content, here by example of commonly popular and mostly beloved James Bond character.

Thus, this takes place by means of study especially on meeting the requirement of originality of the work in question, which can be assessed by means of comparison with other works as well as the scope of development and transformation of the particular work and/or its elements. Also the sheer feeling of the observer is not unimportant in this field. Then law can truly help supporting innovation and inspiration, but at the same time praise originality and authorship, defendable against copying.

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59 *Danjaq* (1998), par. 3.

60 *Danjaq* (1998), par. 4.

61 *Danjaq* (2001), pp. 952-955.

62 *Danjaq* (2001), pp. 955-956.

63 *Danjaq* (2001), pp. 956-959, especially p. 959.

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- U.S. Court of Appeals for Ninth Circuit judgment in: *Danjaq LLC. v. Sony Corp.* (2001), 263 F.3d 942;
- U.S. District Court C.D. California judgment in: *Danjaq LLC. v. Universal City Studios LLC* (2014), 2014 WL 7882071;
- U.S. District Court C.D. California judgment in: *Danjaq LLC. v. Sony Corp.* (1998), 49 U.S.P.Q.2d 1341;
- U.S. District Court C.D. California judgment in: *Metro Goldwyn Mayer Inc. v. American Honda Motor Inc. Co.* (1995), 900 F.Supp 1287.



## Chapter VIII

### Popular Culture and Legal Culture in Contemporary Age





ADVERTISING AND THE RULE OF LAW.  
LAW IN REPRESENTATION OF INSURANCE  
IN LATE 19<sup>th</sup> CENTURY NETHERLANDS

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Since the late 19<sup>th</sup> century, insuring one's life and health has been an important facet of modern life for both individuals and socio-political communities all over Western Europe. As the Dutch nation-state slowly started to act as an insurer at the turn of the century, private insurance companies and corporate societies also expanded their activities. Thus, insurance against the risks of (social) life expanded, developing from a bourgeois privilege into an encompassing socio-cultural practice<sup>1</sup>. This paper argues that the expansion of life-, health- and invalidity insurance was not only part of the juridification of society in the late 19<sup>th</sup> century<sup>2</sup>, but that the insurance democratisation was facilitated by the cultural transmission to and dissemination of law amongst the (lower) middle-classes. This text examines media representations of insurance law, specifically advertisements, to understand how the law extended to and became part of ordering daily life for individuals in the Netherlands. It will identify the visual and narrative forms used by commercial insurers to sell the law as the foundation of insurance schemes. The paper will also demonstrate how insurance practices, and more particularly their legal foundations, helped to shape visual and material culture at a time when the Netherlands were stepping into the age of mass production and consumption<sup>3</sup>.

The term 'insurance' is restricted here to life-, health-, and invalidity insurance<sup>4</sup>, namely those schemes that protected against the financial and health risks for waged workers. Although the term encompasses different insurance actors, it is here confined to commercial insurance companies. Using the definition shaped by the legal scholar Susanne Baer, 'the law' comprises the «totality of norms which are binding for the members of a certain group and which are set and followed by this same group»<sup>5</sup>. This notion of law is not

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1 VAN GERWEN, VAN LEEUWEN (2000); VAN GENABEEK (1999).

2 DEBAENST (2013); SCHWITTERS (1991).

3 VAN GERWEN (1996), p. 27.

4 EWALD (2011), pp. 23-29.

5 BAER (2011), p. 91.

restricted to the positive law of the state, enacted by a legislator or a judge. Rather, law is understood as a set of binding rules and regulations, including insurance contracts and statutes drawn up by private companies or mutual aid societies. The article focuses on two different dimensions of how commercial insurers (visually) represented social insurance as grounded in the law. Together with Stacy Takacs 'representation' is thereby understood as «the process by which meanings are produced and exchanged through a shared sign system» that is made of texts, images and objects alike<sup>6</sup>. First, I analyse the imagery companies used to sell insurance. Second, I consider the narrative strategies that introduced life- und invalidity insurance into middle-class communities.

The Low Countries had a long tradition of mutual insurance reaching back to the Middle Ages, a history that the early urbanisation of the region accelerated. After the guilds had been abolished by the French revolutionaries in 1798, numerous mutual aid and burial societies took over their tasks<sup>7</sup>. Many of the life insurance companies set up in the late 19<sup>th</sup> century, some of which developed into large international businesses, sprang from these traditional mutual aid or burial societies<sup>8</sup>. While the foundation of the first Dutch life insurance company, *De Hollandsche Societeit*, dated back to 1807, it was only in the last third of the 19<sup>th</sup> century that this branch genuinely started to flower. Around the same time, Dutch governments debated the introduction of state-sponsored social insurance for workers in particular branches<sup>9</sup>. Thus, the very idea of insurance through legal contract developed into a mass socio-cultural phenomenon. In fact, insurance as a social practice and as a consumer good was intimately linked to rising wealth amongst the middle-classes amidst the country's late industrialisation, which began around 1870<sup>10</sup>. This entrance into modernity was accelerated by the infrastructural, socio-cultural and political integration of the Netherlands – formerly a loose connection of sovereign provinces – into a unitary nation-state<sup>11</sup>. The introduction of the workmen's compensation act, the first statutory social insurance scheme providing for compulsory insurance against working accidents for some branch-

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6 TAKACS (2015), p. 67.

7 VAN DER VALK (1996), p. 280.

8 VAN GERWEN, VERBEEK (1995); VAN DER VALK (1996), pp. 256-257.

9 SCHWITTERS (1991).

10 WIELENGA (2015), p. 181.

11 WIELENGA (2015), pp. 187-192; VAN GERWEN (2000), p. 21.

es, was part of this integration process, as were the commercial insurers' nation-wide advertising campaigns.

### 1. *Law and the imagery of insurance advertisements*

Insurance companies' growth, the expansion of the securities market, and their mounting budgets allowed the insurers to increase and diversify their advertising<sup>12</sup>. This included a whole range of published material, from brochures to printed objects like bookmarks and almanacs. Some of the bigger insurance companies, like the *Algemeene Maatschappij van Levensverzekering en Lijfrente te Amsterdam*, even edited weekly journals, which the company's agents distributed in the provinces to entice new clients. The usual way to publicise insurance schemes was through advertisements in daily and weekly newspapers and magazines, and in the so called *assurantie bladen*, like *De Verzekeringsbode* founded in 1881. These magazines were sponsored by the Dutch association for life insurance to naturalise the idea of insurance, and inform the public about issues relating to the insurance business<sup>13</sup>. In all of these publications – brochures and objects, newspaper and magazine advertisements – the insurance companies relied on visual representations of insurance, most importantly personifications and allegories. Christian symbolism was ubiquitous: protecting angels and holy virgins holding shields were commonly used to signify insurance's power to protect a family from disaster<sup>14</sup>. Religious imagery – claiming a divine foundation for the insurance business – was deployed to dispel complaints that insurance was «establishing monetary equivalences for sacred things»<sup>15</sup>. Allegories reflected the life insurers' endeavour to construct a three-fold image for their business as one in harmony with religious beliefs, while at the same time grounded in scientific calculation and the rule of law. Finally, in a context of rising nationalism,

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12 Literature employing a cultural-historical approach to the expansion of commercial insurance is very scarce. For an overview of the development of life insurance in 19<sup>th</sup> century Netherlands from a socio-economic- and political-history perspective, see VAN GERWEN (1998A), VAN GERWEN (1998b) and VAN GERWEN (1996).

13 VAN GERWEN (1996), p. 31.

14 VAN GERWEN (1996), p. 43. See for example *Levensverzekering Maatschappij Dordrecht*, in: Archives International Institute for Social History (IISH) Amsterdam, 04075, A1/I/30.

15 ROTMAN ZELIZER (1979), p. xii; VAN DER VALK (1996), p. 256; VAN GERWEN (1998A), p. 395.

insurance was also represented as perfectly fitting the Dutch way of life. Often, the insurers used pictures showing familiar and cliché-like scenes from a ‘typical’ Dutch day. For example, a bookmark edited by the *Hollandsche Societeit* depicted upper middle- and working-class people strolling and doing their shopping at the market in front of a Dutch-looking house façade. While trying to evoke trust and national feelings through pictures of a familiar scenery, the bookmark was also intended to bridge social classes and thereby to broaden the company’s target group<sup>16</sup>.

Another common allegorical feature within insurance companies’ publicity was the representation of the law. Many of these legal allegories stemmed from an ancient tradition of legal emblems. In 1672, the Early Modern English miscellaneous writer Thomas Philipot defined legal emblems as little icons comprising the legitimate representation of the priest office inserted into the priest’s vestments<sup>17</sup>. Legal emblems are, as Peter Goodrich put it, «the legitimate image of law as a mixed knowledge and practice, as an expression of ‘things divine and human’, as rule and administration, legislation and *oeconomic* disposition»<sup>18</sup>. The imageries developed by the modern Dutch insurance companies rested on a similar principle, designed to be accessible for an educated public and to make «the foundations of law, its roots in nature, reason and moral use, visible» to the educated middle-classes<sup>19</sup>. Besides appealing to a literate public, the imagery of law was also meant to appeal even to consumers unable to interpret the deeper historical meaning of the legal allegories.

A telling example of how publicity imagery fulfilled both of these advertising purposes is the bookmark edited around 1882 by the Dutch life and invalidity insurance company *Eerste Nederlandsche Maatschappij op het leven, tegen invaliditeit en ongelukken*<sup>20</sup>. The imagery on the long bookmark was twofold. The bottom displayed the company’s emblem, which was printed on all its publications and contained a slightly modified representation of the goddess Justitia holding a balance in her hands and bearing a shield symbolizing protection. The emblem also included an hourglass symbolizing the course of a life and a globe to appeal to travelling tradesmen. Unlike Justitia,

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16 Hollandsche Societeit, bookmark, in: IISH Amsterdam, 04075, A1/I/2.

17 PHILIPOT (1672).

18 GOODRICH (2014), p. 13.

19 GOODRICH (2014), p. 13.

20 IISH Amsterdam, 04075, A1/I/33.

the company's figure was not blindfolded, probably in order to dispel any indication of arbitrariness or blindness in compensating a victim or the family of a deceased person. Hence, older representations of the law were referred to and, at the same time, re-interpreted to suit the insurance business. On the bookmark, the female allegory was situated in between two scenes depicting the mobility of modern life: a train was located on the left and a steamship on the right. The representation of mobility reinforced the targeting of travelling businessmen in many advertising brochures, fitting with the Dutch tradition as a trading nation. For example, in 1895, the large insurance company *Utrechtse Levensverzekering Maatschappij* edited a publicity booklet directly aimed at Belgian travelling businessmen: *Un mot à MM. les voyageurs de commerce*<sup>21</sup>.

The representation of modern transportation, which also figured on the top part of the bookmark, was also intended to make the idea of insurance approachable for members of the lower middle-classes. By depicting a dramatic train accident, the allegory highlighted the need for insurance as immediately necessary for average peoples' living in a period of industrialisation, as the railway network expanded<sup>22</sup>. Besides appealing to the spectator's personal experiences, the train accident was also meant to provoke emotions that would spur people to sign a life insurance contract. The juxtaposition of the top and the bottom pictures of the train accident and an orderly transportation system supervised by Justitia, was designed to convince consumers that insurance employed the law to ensure public safety.

The double function of the legal allegories – appealing to reason as well as emotion – is also evident in imagery created by the big *Algemeene Maatschappij van Levensverzekering en Lijfrente* for business cards and the cover of an 1882 advertising brochure<sup>23</sup>. The company's material depicted four men dressed in robes and long wigs. The men were assembled around a table in front of a book shelf holding huge volumes and a small antique statue. To complete the 'academic atmosphere' created by these items, one of the men held a book in his hands, while another pointed to a page in a book on the table. To the contemporary observer, the men's appearance together with the surrounding objects most likely referenced lawyers, a group that symbolized

21 Utrechtse Levensverzekering Maatschappij, in: IISH Amsterdam, 04075, A1/I/34.

22 For an interpretation of the Netherlands' entrance into modernity from an infrastructure-perspective see VAN DER WOUDE (2007).

23 IISH Amsterdam, 04075, A1/I/32.

the seriousness and trustworthiness of the life insurance company. For the general public, legal professionals were represented as the trustworthy leaders – or supervisors – of the insurance business, ensuring that the insurers always followed the rules laid down in their statutes.

Yet, for a more educated spectator, the allegory may in addition have taken on a second meaning. The image depicted four individuals who in the 17<sup>th</sup> century, the Dutch ‘Golden Age’, had contributed to the development of actuarial science, that is, the measurement of risk and uncertainty, the basis of the insurance business<sup>24</sup>. Unlike traditional insurance funds that relied on their experience to establish an individual’s risk level and premium, modern life insurance employed new methods from actuarial science to calculate individual risks and thereby determine premiums<sup>25</sup>. This scientific technique was supposed to make modern life insurers safe from bankruptcy, which had destroyed many traditional insurance funds. The *Algemeene Maatschappij*’s advertisements showed the important Dutch statesman Johan de Witt (1625–1672), the astronomer, mathematician and physicist Christiaan Huygens (1629–1695), the Amsterdam regent and mathematician Johannes Hudde (1628–1704) and Nicolaas Struyck (1666–1769), mathematician, astronomer and pioneer on the field of statistics. In the late 19<sup>th</sup> century, most life insurance companies were run by an advisory board composed of academics from these scientific fields, together with lawyers and medical doctors. Their names and areas of expertise were mentioned in the advertising brochures and in other publications as a sign of the professionalism of the insurance business. The *Algemeene Maatschappij* employed these four historic individuals as a symbol of professional competence and national pride as they were major symbols of the Netherlands’ past glory. But even to those observers who failed to see all of these deeper meanings, the image worked as a simple representation of the insurance company’s adherence to the rule of law.

The use of the law within the insurance business and the companies’ integration into the state’s legal system were also highlighted with the use of a label for the *koninklijke goedkeuring* (royal consent) given to the company’s tariffs<sup>26</sup>. From 1830 to 1880, royal decree dictated that state officials control

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24 On the development of the actuarial science and profession in the Netherlands, see STAMHUIS (1998).

25 VAN GERWEN (1998a), p. 391.

26 For the setting up, development and significance of this policy for the evolution of the insurance business in the Netherlands see VAN DER VALK (1996).

the tariffs and statutes of insurance companies. After 1880, when the loosening of legal regulations contributed to the expansion of life insurances<sup>27</sup>, the label *koninklijke goedkeuring* was still a regular feature of most company publications<sup>28</sup>. It was meant to advertise the company's services by referring to state regulation and – particularly royal – authority. The general reference to the *koninklijke goedkeuring* was part of the narrative strategy designed by the insurance industry to popularise insurance. The law was an important element of these narrative strategies.

## 2. Narrative strategies in insurance-publicity

Insurance companies' publicity often consisted of lengthy advertisement brochures, little handbooks that could be more than forty pages long. Generally, this material contained a pedagogic explanation of the principles of life or health insurance, often organized as a clear and simple question-and-answer section. A telling example of this kind of advertising technique is the booklet written by Henri Willocq, director of the Belgian department of the Dutch company *Utrechtse Levensverzekering Maatschappij*, which was founded in 1883 as an offshoot of the traditional burial society *Let op Uw Einde*. The booklet, entitled *Petit Manuel Pratique de l'Assurance sur la Vie à l'usage des familles par demandes & réponses* was published in 1892 and translated into Dutch in 1893<sup>29</sup>. This publication demonstrates that the company's advertising strategy was targeted at the large middling layers of society composed of those social classes that relied on a daily wage. Question five of the 75 listed in the booklet stated that life insurance was designed for «lawyers, doctors, industrials, businessmen, employees, workers, yes, all whose work is their families' only support»<sup>30</sup>. The *Nationale Levensverzekering-bank te Rotterdam* also made transparent its intention to broaden the life insurance customer base by addressing heterogeneous social groups. One 1880s advertising publication asked: «How many of our fellow citizens live from an income that, even if parsimoniously spent, is just enough to cover the daily necessities and of which, at the end of the year, not much is left?»

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27 VAN GERWEN (1998a), p. 392.

28 VAN GERWEN (1996), p. 39. See for example the publicity of the *Levensverzekering Maatschappij* Dordrecht, in: IISH Amsterdam, 04075, A1/I/30.

29 WILLOCQ (1892), in: IISH Amsterdam, 04075, A1/I/34.

30 WILLOCQ (1892), p. 9.



– and which would not be a sufficient sum for the widow's support after her husband's sudden death<sup>31</sup>.

In case of the *Petit Manuel de l'Assurance sur la Vie* by H. Willocq, the broadening of the target group was combined with a simplification of life insurance as a complex mathematical construction resting on a legal contract. In fact, H. Willocq blurred these abstractions of life insurance, replacing them with references coming close to personifications of *L'Assurance sur la Vie* written with capital letters all throughout the booklet. The manual asserted that insurance was «a very sage and very moral operation whose aim was to achieve a relatively high capital in exchange for a yearly paid premium»<sup>32</sup>. In response to the question of whether insurance was necessary at all, the manual replied that: «yes, it is a real duty to benefit from the blessings of life insurance in order to protect oneself and his next of kin from the hazards of the unknown»<sup>33</sup>. Unlike the numerous visual representations of life insurance, the advertising text deemphasized the mathematical and juridical foundations of insurance. While visualizations were an effective means to overcome the abstract character of these foundations by incorporating them into an allegory, a text could not fulfil this double function. It required specificity, concreteness, and simplification in order to appeal to a wider public.

Deemphasizing the rational – and very much profit-oriented – aspects of the life insurance business also allowed the *Utrechtse* to play up the pedagogical and moral rationales for insurance. This purpose was embedded in questions and answers such as: «What is the first duty of any good father of a family, then? – It is to insure his life»; or «Does life insurance contribute to the happiness of the family? – Yes, because it assures the well-being of your wife and children in the future»<sup>34</sup>. The educational, moralising approach taken by life insurance companies became even clearer in another publication of the *Utrechtse*, a booklet written by M. Brinkgreve and entitled *Te laat* (Too late)<sup>35</sup>. The booklet tells the fictional story of a family whose breadwinner dies, unexpectedly plunging his widow and teenaged children into misery. Shortly before his death, the father of the family talks with his wife who is afraid of

31 Nationale Levensverzekeringsbank, Prospectus, Rotterdam 1885?, in: IISH Amsterdam, 04075, A1/I/34, 20.

32 WILLOCQ (1892), p. 5.

33 WILLOCQ (1892), p. 7.

34 WILLOCQ (1892), pp. 6-7.

35 M. Brinkgreve, *Te Laat*, De Verzekeringsmaatschappij *Utrecht*, n.d. Utrecht, in: IISH Amsterdam, 04075, A1/I/34.



the unforeseen. He also discusses the issue with a friend who recommends life insurance to assure his family's future in case of his unexpected death. But the story's main character is simply too greedy to pay a regular premium and too confident in his own good health. Lying on his deathbed, he fiercely regrets not taking his friend's advice, now that it is 'too late'. Most advertising texts used this moralising approach as the campaign for insurance expansion was linked to the so-called *beschavingsoffensief* of late 19<sup>th</sup> century Netherlands<sup>36</sup>. This term designates the endeavour by churches, bourgeois charity organisations, and professional relief funds – insurance companies amongst them – to 'civilise' poor people and workers by instilling in them values of self-discipline, self-help, and focus on the long-term rather than the immediate satisfaction of needs.

The companies' publicity sold insuring one's life and health and thereby the future of one's family as the very embodiment of a rational and responsible life-style. The insurers' narrative strategy often linked the contemporary 'social evils' of vagrancy, uneducated children, and material poverty directly to the failure of the father and husband to insure his life. Based on this incentive for a responsible life-style, insurance companies promoted an image of their business that emphasized their contributions to the general improvement of society<sup>37</sup>. Yet, the narratives employed by insurance advertising fit in with many other late 19<sup>th</sup> century Western European disciplining practices, such as compulsory education and military service, as well as the endeavour to separate male and female spheres<sup>38</sup>. The disciplining feature of the insurance business was clearest with the compulsory health check, which all potential clients of a Dutch life insurance company had to undergo from the late 19<sup>th</sup> century onwards<sup>39</sup>. This procedure fitted the companies' self-conception as rational, science- and fact-based enterprises – characteristics and faculties that were exclusively associated with men.

The texts in the advertising booklets and brochures created a main character, generally a caring husband and father of a family. An important aspect of this narrative strategy was the construction of a middle-class social standard

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36 VAN GERWEN (1998a), p. 395.

37 VAN GERWEN (1998a), p. 394.

38 GERHARD (1997).

39 VAN GERWEN (1998a), p. 393. As an example for the health certificate to be filled in by a doctor see the standard form in the statutes of the Hollandsche Maatschappij van Levensverzekering from 1863, in: IISH Amsterdam, 04075, A1/I/25.

in which the father and husband was the breadwinner of a family, ignoring the fact that many wives were wage-earners as well<sup>40</sup>. Accordingly, the fictional stories directly addressed male breadwinners, who by insuring their lives could become 'good and responsible' citizens, fathers, husbands, and workers. Meanwhile, women were often presented as hindering their husbands from acquiring insurance – even though they would suffer most from their husbands' early death if they remained uninsured. Unlike the man who was expected to make rational decisions, women were said to act out of their 'natural being', out of naiveté and superstition<sup>41</sup>. Even if wives were not against insurance per se, they approached an unexpected future with fear, rather than with a rational plan to counter this fear, like in the story by M. Brinkgreve *Te laat*. Only men – the breadwinners and protectors of the family – could deal with the legal complexities of insurance in a rational way<sup>42</sup>.

Besides educating its public, the companies needed to find ways to introduce insurance into average peoples' daily lives, requiring the transmittance of law into social practice. The most frequent tactic was the dissemination of company regulations, tariff systems, and copies of the contracts clients would have to sign. These documents were frequently included in advertisement brochures. At their end, the booklets often included numerous pages with columns of figures, which were probably hard for most readers to decipher but were instead intended to inspire a belief in the reliability and professionalism of the insurance company<sup>43</sup>. The *Nationale Levensverzekering-Bank Rotterdam* was not the only one to add explanatory text. A short and simply worded personalised story was widely used to translate abstract tariffs columns into something understandable and relatable<sup>44</sup>.

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40 VAN DER KLEIN (2003).

41 VAN GERWEN (1998a), p. 395.

42 See for example B. A. Rubens, onder-directeur voor Nederland van de Levensverzekering-Maatschappij *Caisse Générale des Familles*, Bespiegelingen van een Agent in Levensverzekering, n. d., in: IISH Amsterdam, 04075, A1/I/2.

43 See for example: Hollandsche Societeit van Levensverzekering, in: IISH Amsterdam, 04075, A1/I/6; Nationale Levensverzekering-Bank te Rotterdam, in: IISH Amsterdam, 04075, A1/I/25; Algemeene Friesche Levensverzekering-Maatschappij, in: IISH Amsterdam, 04075, A1/I/24; Levensverzekering Maatschappij Dordrecht, in: IISH Amsterdam, 04075, A1/I/30; Levensverzekering-Maatschappij *De Nederlanden* van 1845, in: IISH Amsterdam, 04075, A1/I/19a.

44 Nationale Levensverzekering-Bank te Rotterdam, in: IISH Amsterdam, 04075, A1/I/25.

As competition grew fiercer with the expansion and internationalisation of the insurance market, some life insurance companies expanded their advertising techniques from product dissemination to more expansive attempts to embed insurance practice within average peoples' everyday lives. A telling example for this strategy is the publicity campaign by the British Ocean Accident and Guarantee Corporation, in cooperation with the Dutch margarine producer *Souvenir Margarine*<sup>45</sup>. With the purchase of a package of this margarine, the costumer received an insurance policy from the Ocean Accident Company that was valid for a week. Another package of margarine had to be bought the following week in order to renew the insurance coverage. Advertisements for this sales promotion, with the slogan that only those who regularly bought *Souvenir Margarine* were sufficiently insured, could also be found in newspapers. The customer was supposed to receive the insurance policy from the shopkeeper. Before sending it to the insurance company, it was to be signed by the person to be insured and by a witness. With his or her signature, the costumer also agreed to a particular form of conflict resolution. Conflict resolution was usually regulated in insurance contracts and contributed to making insurance a legal practice situated in between state jurisdiction and private mediation. Article 8 of the Ocean-Accident-contract stated that in the case of conflict between the company and the insurance-holder, an arbitration committee had to be created by the conflicting parties themselves. If they disagreed on the composition, an Amsterdam judge would have to appoint three arbitrators paid by both contracting parties. It is not the legal practice itself that is remarkable but rather the way in which it entered into individual Dutch homes, via a simple package of margarine, an everyday consumer item.

Insurance companies were creative in using objects of daily consumption to spread information on life insurance as an essential part of a responsible life. Almanacs, wall calendars and bookmarks were among the most popular give-aways used by insurance companies. In 1890, the British Union Assurance Society edited an almanac listing on its first page all Christian and Jewish bank-holidays alongside the usual presentation of the company and its lists of tariffs. The remaining pages were reserved for a monthly calendar, each page containing a moralising advertising slogan. December read: «Life insurance is the best guarantee a father can give to his family. Blind is the one

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45 The Ocean Accident & Guarantee Corporation, Limited te London, in: IISH Amsterdam, 04075, A1/I/2.

who mistakes its blessings, egoistic the one who does not purchase an insurance». Sometimes, a quotation from a well-known personality was used to put forward the supposedly indispensable character of insurance<sup>46</sup>.

However, it was not only through these items that insurance became a part of daily material culture. Insurance buyers also started to accumulate paper. For the insurance company administration and for private households, the social practice of insurance materialised in the form of accumulated files<sup>47</sup>. A closer look at the materiality of social insurance law would broaden this investigation of the cultural dimensions of the insurance boom in late 19<sup>th</sup> century.

### 3. *Conclusion*

In late 19<sup>th</sup> century Netherlands, insurance against the risks of social and particularly work life developed into a mass phenomenon. This process must be placed in its socio-cultural context, namely the transforming consumption culture, and the political context, as insurance turned into a political issue. Against this background and in order to disseminate life-, health- and invalidity insurance, the insurance industry rationalised the law as regulation and culture. Selling life insurance, and thus selling the legal system upon which insurance was built, tells us about late 19<sup>th</sup>-century society and its visions for the future. It can also give us an idea of how law was reimagined as a tool for the shaping of social relations.

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<sup>46</sup> British Union Assurance Society, in: IISH Amsterdam, 04075, A1/III/45.

<sup>47</sup> Cf. VISMANN (2000).

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NEWSPAPERS AND THE MAKING OF POPULAR LEGAL CULTURE.  
THE EXAMPLE OF THE DEATH PENALTY IN FRANCE  
(20th CENTURY)

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Since the seminal symposium “Popular Legal Culture” published in the 1989 issue of *The Yale Law Journal*<sup>1</sup>, a growing body of writings has developed and «a subdiscipline of scholarship on how law and culture (mostly mass media) influence each other began to take shape»<sup>2</sup>. This paper aims at contributing to this field, with a historical perspective, and looks at the importance of the press in the building of popular legal culture<sup>3</sup>. It's also an invitation for legal historians to use abundant material – newspapers – which unfortunately suffered from a lack of legitimacy. The press was an important part of popular culture in the 19<sup>th</sup> and 20<sup>th</sup> century, to the extent that some historians talked about a ‘civilization of the newspaper’<sup>4</sup>. Journalists investigated all aspects of social life, and law was no exception. Of course, the specialized press debated questions of law, but so did the entire press, either during the legislative process, or to make some comments about judicial decisions, or to give some practical legal advice to taxpayers or landlords. A large media activity commented on and sometimes contributed to the evolution of the law. The popular press assumed a role of transmission of juridical knowledge, even if this transmission was quite imperfect. A study of ‘legal culture’<sup>5</sup> should not forget that, for modern times, news papers reading

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1 *The Yale Law Journal*, 98, 1989: see especially MACAULAY (1989); FRIEDMAN (1989); YNGVESSON (1989). The notion of popular legal culture «(...) implies the existence of an official culture of law distinct from everyday legal practices and understandings», YNGVESSON (1989), p. 1689.

2 CARRILLO (2011), p. 70.

3 This paper is a revised version of my communication, initially entitled “Can Newspapers Be a Source Material for Legal History? Penal and Penitentiary Law of the Death Penalty in the Judicial Journalism (France, 20th century)”. I'd like to thank Pierre Neri, Paolo Avignon, Sokho Trinh (University of East London) and Pr Claire Dutriaux (Sorbonne Université) for helping me to improve this paper.

4 KALIFA, RÉGNIER, THÉRENTY, VAILLANT (2011).

5 As presented at the beginning of this paper, I follow a specific tradition about the



shaped the most commonly shared ‘legal culture’, even in its most sensation-alistic articles. It’s true for the common people and laymen in the field of law, but also, to some extent, for those who studied and practiced law. Newspapers could also be considered as a medium in which legal culture encountered other fields of the general culture, literacy, politics, economy: in a few words, a medium in which law crossed other humanities, in a prodigious intertext<sup>6</sup>.

However, newspaper articles are not often considered as a legitimate source material for legal history, in part, precisely, because of their composite structure. At best, they stand as a secondary source offering some contextual explanations or compensating a lack of documentation and the destruction of archives. The true and legitimate sources of legal scholars are doctrinal books and reviews, parliamentary publications or judicial archives. Several reasons may explain this perspective. Articles in the popular press were often vague and sometimes fictitious. Their documentary purpose was often clouded by spectacular or recreational concerns. Journalists often portrayed, in their life stories, how they learnt to give spice to any event. Famous writer and journalist Roland Dorgeles discussed his professional beginning in 1910, when his line manager asked him to write an article about a crime he had no information about: «It was the first time that I could write about some true-life events, based on real facts, and, strange contradiction, it was also the first time that I had to dream up some facts, because except for the spelling of the last names,

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definition of the term ‘legal culture’. Some other assumptions of this term could be defended. Most of the time, the idea of a ‘legal culture’ tends to be used for comparative reasons, and comparatist scholars have produced an abundant work on this issue. Cf. NELKEN (2004); NELKEN (2014). In the french-speaking world, the term ‘culture juridique’ assumes a similar function, with some variations. Cf. AUDREN, HALPÉRIN (2013). The authors use the term to put the emphasis on the professional culture of jurists and lawyers : «Nous proposons de partir d’une définition, aussi provisoire que minimaliste, des cultures juridiques conçues comme un ensemble de valeurs, de savoirs et de savoir-faire qui orientent, donnent sens et cohérence aux activités des différents professionnels du droit», p. 8. ‘Culture juridique’ is however in competition with the term ‘culture judiciaire’, used by some social historians (cf. FAGGION, REGINA, RIBÉMONT (2014). The authors don’t explain why they chose the term ‘culture judiciaire’ instead of ‘culture juridique’). Both are sometimes used for each other, revealing a lack of work of definition among the french-speaking scholars. Discussing to some extent the frontiers and theoretical implications of these different terms exceeds the ambitions of this paper, and my own approach follows the directions opened by the 1989 issue of *The Yale Law Journal* 98.

6 Literature scholars have developed the notion of intertextuality in several works. Cf. RABAUD (2002). I’d like to thank Dr Matthieu Vernet (Collège de France) for this reference.



I didn't know anything about this story»<sup>7</sup>. Journalistic accounts were often, for good reasons, viewed as inaccurate, emotional, 'un-scientific' and therefore far away from the technical and rational characteristics of the legal texts. Moreover, there was some sort of rivalry, maybe unconscious, between jurists and journalists to estimate what was right and what the law should state. Newspaper articles were often explicitly or implicitly critical of judicial decisions and of how the justice administration worked. However, several elements originating from social history, literary studies and cultural studies could contribute to reassess the position of these articles as a source material for legal history, as 'law-produced' as well as 'law-producing' documents.

Indeed, the reservations about the use of the press as a source are not a distinctive feature of legal history, and for a long time social history expressed the same reluctance towards these documents. But there has been quite a change in the way historians now handle them in the past three decades. Now nobody challenges the importance of this source for social and cultural history. Of course, these narratives are not considered as a mere reflection of social practices. But their blurring and distorting features allow to reveal some representations<sup>8</sup>, as well as social and gender positions<sup>9</sup>. The opening of the judicial sciences to the literary studies, with the 'law and literature' movement is another element of change<sup>10</sup>. One of the main ideas of this movement is that some literary works could be read as legal documents, and legal documents as literary works. However, newspapers haven't taken advantage of this new point of view, because these narratives suffer from a lack of legitimacy in comparison with more 'classical' genres such as novels or essays<sup>11</sup>. Nevertheless, literature studies have shown their similarity with literature,

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7 «C'était la première fois de mon existence que j'écrivais quelque chose de vécu, que je relatais un fait pris dans la vie même et, contradiction étrange, c'était la première fois que je devais imaginer, car à part l'orthographe des noms propres [...] j'ignorais à peu près tout de l'histoire que j'avais à conter». The translation is mine. Roland Dorgeles quoted by THERENTY (2007), p. 138.

8 See especially the notion of 'discours social' developed by ANGENOT (1989). Cf. also TAVERNIER, NOYER, LEGAVRE, DELFORCE (2010).

9 There are several works on the use of the press by social and cultural historians. Among them CLARKE (1952); TAFT (1970); KNUDSON (1993). See an overview with JONES (2005).

10 For a view of the openings offered by this movement, cf. WARD (1995).

11 For an example of the use of literary sources, see the magistral work of John Cyril Barton on the issue of the death penalty. BARTON (2014).

especially through the character of the writer-reporter<sup>12</sup>. They have exposed the possibility of studying these reports, to some extent, as literary documents. This approach could also inspire juridical sciences, in order to study them as legal documents. The cultural studies, with the field of research called 'law and popular culture'<sup>13</sup>, established another way to look at the relationship between law and other cultural productions, however the press is rarely studied as a part of this 'pop culture'<sup>14</sup>.

The example of the study of the death penalty in France affords an example of this way of considering the press as part of legal culture<sup>15</sup>. Newspapers play a role in the evolution of the law when they influence the passing of new bills penalizing new crimes (1). Press judicial reports offered a view on the working and practice of law. They allowed the reader-citizen to set up a popularized legal culture: this representation being predominant in society (2). They explore some obscure areas of criminal law and pardon procedure and they can be used to open the black boxes in the decision-making process (for example in the jury's room or in the presidential office) (3). They are part of the few documents available to grasp the official rules in use in prisons – few official documents dealt with the death row in France and the archives of prisons rarely include the regulations they used to implement (4).

1. The press can be considered as a prescriber of law, more exactly of legislation and especially in penal matters. The death penalty became the sanction of five new categories of crime in France during the 20<sup>th</sup> century. For two of them<sup>16</sup>, the root of the new bills could be found in crime stories, and for the three others<sup>17</sup>, strings of similar cases led to the bills. For example, the 1937

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12 BOUCHARENC (2004).

13 REDHEAD (1995). See also the essays presented at the Symposium on Law and Cultural Studies held at the Yale Law School, 14<sup>th</sup>-16<sup>th</sup> April 2000, and published in the *Yale Journal of Law & the Humanities*, vol. 13, 2001, and especially SARAT, SIMON (2001).

14 Cf. for example ASIMOW, BROWN, PAPKE (2014). Movies, TV shows, and 'legal dramas' are the main materials of the contributors.

15 Most of the following examples came from my PhD Thesis, which is a work of social history, and not one of legal history. If I used newspapers as a material, most of the data came from traditional archives. I'll only put an emphasis on the part of my work which considered the intrication between legal aspects and the press.

16 1937, Law on the Kidnapping; 1954, Law on the Abuse Committed against Children.

17 1946, Law on the Traffic on the Black Market; 1950, Law on Robbery; 1950, Law on Arson.

law established the death penalty for kidnapping, if the kidnapping was followed by the death of the child. Several bills were issued after a virulent press campaign about a case taking place in Marseilles in 1935. An old woman abducted a 3-year-old child in a park, a ransom was demanded. The story ended well, with the arrest of the kidnappers and the release of the young boy, safe and unhurt. But for one week, popular newspapers benefited from this story. They increased their print runs, and they echoed the emotion of the French public opinion. They denounced the invasion of American-style crimes – the Lindbergh case was still recent – and they asked for extreme measures such as the death penalty. The large amount of articles about this affair explained why the same day, 3<sup>rd</sup> December 1935, four different bills, coming from the different benches of the Assembly, asked for more severe punishments against the kidnappers. The legislative process unfolded with very little debate, in front of the legislative committee as well as in front of the Parliament. In this case, as in many others, the journalists were at the root of the shaping of the law, translating the public emotion into potential legal measures, and using examples of laws from other countries to legitimize the decision.

2. The press is also a way to better understand judicial practices. It can unveil some practices escaping procedure law: for example, the practice of the ‘administrative investigation’ or ‘unofficial investigation’ in France, in the case of criminal procedures. This unofficial investigation didn’t exist in the Code of criminal procedure of 1808. It was mentioned quite late in some decrees and appeared into a parliamentary act only in 1933<sup>18</sup>. This unofficial investigation designated the inquiry led by the police before the accused person was handed to the judge in charge of the official investigation. It was led without or the presence of a lawyer a judge and it was often the scene of police violence and of mishandling of evidence. Journalists used to maintain good relationships with policemen, which is why they were good witnesses of the obscure elements of this part of the procedure.

Journalistic accounts of these investigations weren’t neutral and the press could also put constant pressure on these policemen and could alter the good functioning of justice. A 1957 affair led to a miscarriage of justice, with the result that an innocent was sentenced to death. One of the investigators accused the press: «The article of the *Midi Libre* was the main cause of the change of attitude that [our chief] adopted on the next morning. It was too late to

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18 GARRAUD, GARRAUD (1934), p. 869.

step back, because stepping back would have been considered as a fault by the whole population»<sup>19</sup>. Many observers regretted that the presence of the media disturbed the impartiality of justice. But rather than considering it as something external to the shaping of the practice of law, some sort of parasite coming to alter the purity of law, legal scholars could admit this role, and consider it as a part of the judicial process, with very practical consequences on principles such as the presumption of innocence. Legal history could even evaluate the part of the press in the completion of the judicial decision rather than only examining the technical and internal arguments. This change of point of view goes with the evolution of the legislation: in France, since a 2000 reform, one of the magistrates makes the link between the court and the press to avoid «(...) the propagation of fragmented or wrong news and to end the disturbance of public order»<sup>20</sup>.

3. Legal historians could also consider the interest of the press as a material source when there is absolute ‘silence of the archives’<sup>21</sup>, as about some points of the decision-making process, especially in the penal procedure, when the trial goes from its inquisitorial phase to the accusatory one. In France, when the trial becomes oral and public, there is nothing left in the archives to give us the content of the exchanges between the court, the accused, the victim, the witnesses. The press functioned then as an imperfect recording of the «experiments» held in «those great laboratories of the law, the courts of justice»<sup>22</sup>. Newspapers became, with some published pleadings, and quite rare

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19 «L’article du *Midi libre* a été la cause déterminante de l’attitude que [le chef de l’enquête] adopte dès le matin du 8. Il est trop tard pour reculer, car reculer serait se déjuger aux yeux de la population.», letter of the gendarme Doissin, 18<sup>th</sup> March 1957, file 1 PM 57, 4AG/678, French National Archives. The translation is mine.

20 Art. 11 du Code de procédure pénale, alinéa 3: «Afin d’éviter la propagation d’informations parcellaires ou inexactes ou pour mettre fin à un trouble à l’ordre public, le procureur de la République peut, d’office et à la demande de la juridiction d’instruction ou des parties, rendre public des éléments objectifs tirés de la procédure ne comportant aucune appréciation sur le bien-fondé des charges retenues contre les personnes mises en cause ». See LECLERC (2012).

21 FARCY (2015), p. 26.

22 SMITH (1909), p. 21, quoted in CARDOZO (1921), p. 23. Munroe Smith and Benjamin N. Cardozo talked especially about the nature of the judicial process of the *common law*, but the metaphor could still apply to other situations. Cf. for example the description of a criminal court by BESNIER (2017), pp. 50-69.

lawyers' archives, the only way to have access to this content, and to hear the juridical and un-juridical arguments of the parties. These debates, pleadings and indictments are in France more often analysed in the works of rhetoricians and literature scholars<sup>23</sup> than in the works of legal scholars, maybe because emotions and oratorical effects shaped these speeches more than juridical thinking, even if they took place in front of a court.

The press is also the only way to get information for another phase of the penal trial, which is the deliberation of the jury. This phase is designed to stay obscure and secret. There is no report of their debates, and until 1941 in France, these juries deliberated outside the presence of professional judges. Newspapers could only give some rumours and they can't be considered as truly reliable, but in absence of other documents, it's the best legal historians can have. The last obscure phase of the decision was not a judicial decision but rather a political one, the issue of pardons, especially important in the case of the people sentenced to death. The President was in charge of this right of reprieve in the French system. For the less important penalties, the pardon was a decision left to the Ministry of Justice, which indicated to the President the commutations to implement. In the case of the death penalty, the Ministry could only issue some recommendations. If the final word was political, the decision-making process looked like a judicial one, because it was in the hands of judges temporarily assigned to the Ministry. Important archives show the enumeration of the different legal reasons to pardon such-and-such convict. The judges who examined their cases could only produce an opinion, and the President wasn't linked to this one. In fact, he decided otherwise between 20% and 25% of the cases, more often in the direction of greater clemency. The President didn't have to justify his decisions. He decided alone, in the secrecy of his own conscience. But the press sometimes proposed an explanation for the presidential 'jurisprudence'<sup>24</sup> regarding pardons, whereas doctrine usually neglected to take into account these 'political' decisions. These explanations weren't quite reliable but at least they offered the beginnings of an analysis, however difficult to compare with a doctrinal analysis.

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<sup>23</sup> SEIGNOBOS (2011).

<sup>24</sup> For example the term 'jurisprudence élyséenne' is used in the article "Le droit de grâce", in *Détective* n. 75 of 3<sup>rd</sup> April 1930, p. 2.

4. Newspapers are also essential to understand what the execution of the death penalty really meant. The articles are then quite difficult to handle because the literature representations particularly saturated their accounts. Most certainly, the French penitentiary administration produced a large documentation on itself, even on some aspects usually neglected by the scholars specialized in penitentiary law, such as ‘micropenalties’, meaning the infra-legal punishments inflicted on the convicts<sup>25</sup>. But bad conditions of keeping, as well as important archive cuts, have often destroyed these archives, which were treated the same way the whole administration treated the prisons, as a problem more than a solution. Moreover, a large part of the actual running of the prisons escaped official rules, for example the abuses on the convicts. It was also the case for the death row, also called the death cells in France. Those cells were quite scattered on the territory in a lot of small prisons. The death row system has never had in France the same extension it was in the United States. If a severe surveillance regime was enforced on the convicts sentenced to death, there was a lot of room for small arrangements. For example, a decree of 1866 imposed the straitjacket for these convicts but it seems that this wasn’t really enforced in most of the prisons. There is a great temptation to use the press to complete the lack of sources. The temptation is even greater because pictures often illustrate the penitentiary accounts, and these pictures are a sort of guarantee of the truth of the recorded facts. But the penitentiary accounts were submitted to a lot of literary clichés, probably more than the judicial chronicles. The references to the works of Victor Hugo were often omnipresent, as well as the recalling of the exoticism and the picturesque features of the traditional underworld narratives<sup>26</sup>. There is the same issue about the truth when it comes to the account of the ultimate execution, the beheading of the convicts sentenced to death. The executioners’ diaries as well as the press show us different truths. The interest of the journalistic narratives was to dramatize each situation. They also tended to use some predetermined patterns. Paradoxically, there were fewer and fewer official descriptions during the 20<sup>th</sup> century. The public prosecutors used to

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25 Cf. two recent symposiums on the matter: “La micropénalité en institutions en Europe (XIX<sup>e</sup>-XX<sup>e</sup> siècles)”, held in Lyon, 12<sup>nd</sup>-13<sup>th</sup> June 2017; and “Administrer la punition” held in Paris, 13<sup>th</sup>-15<sup>th</sup> December 2017, and especially the work of Elsa Génard (Université Paris I Panthéon-Sorbonne).

26 PICARD (2014).

write reports but they became shorter and shorter<sup>27</sup>. These official archives are not quite reliable either: the public prosecutors wanted to display a good organization to their superiors and they minimized eventual incidents.

However, being conscious of these difficulties shouldn't bring legal scholars to neglect the press as a source. Legal history probably knows better than any other field of research how to handle the fake news and the forged papers. One of its 'raison d'être' was to spot them, the story of the 'discovery' of the false donation of Constantin is one of the founding narratives of the scholar community<sup>28</sup>. The evolution of law owes a lot to the false and partial documents, and there is consequently a strong interest to look at them.

To conclude, if there is some legitimacy to not take the journalistic accounts for an established truth, there is no reason to exclude them. They are a source material as any other one, if one makes sure to take into account their two sides, half documentary and half fictitious. Two other aspects should invite legal historians to consider the study of the press: on the one hand, if the press can't be relied on to know the reality of the law, it's definitely the best way to consider which legal culture is shared by the common people, on the other hand, it's in its 'clichés' that scholars could research a better understanding of how law and culture interweave. The press could then be considered as the reflection of the popular legal culture of the time, this culture being constantly influenced by other humanities.

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27 CAROL (2017), pp. 25-26.

28 MAFFEI (1956) and more recently RIALS (1997) and THIREAU (2003).

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# SECULARISM VERSUS RELIGION-BASED LEGAL PLURALISM: THE DIVERSE VIEWS ON THESE CONCEPTS IN MODERN MUSLIM DISCOURSE AND CULTURE BETWEEN 19<sup>th</sup> AND 21<sup>st</sup> CENTURY

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Discussing the vast field of 'law and humanities', Islamic law is also worth mentioning. Numerous institutions of Islamic law are illustrated in various books, movies etc. In the same way, humanities affect the social perception of the Islamic law and its evolution. This paper considers specific field of law which is the nature of legal system on the state level in Muslim countries. In addition to the whole range of intermediate solutions, there are two opposite models of legal system – secular one and religion – based legal pluralism.

Traditionally, Muslim countries in the past were basing their legal systems on the principle of religion-based legal pluralism, guaranteeing its own jurisdiction for each legally recognized denomination<sup>1</sup>, especially in the field of personal law. However, some modern socio-political concepts penetrated the Muslim cultural area. The most important of them were nationalism, secularism and socialism. All those concepts more or less opted for reduction of the role of the religion in law and state. Turkey after 1924 or Pahlavi Persia introduced a secular system. Many Arab socialist countries introduced unified legislation not basing on the criterion of the religion and often taken from the European countries' legislations. But the idea of legal pluralism had not passed away and has its own strongholds, having its revival in the late 20<sup>th</sup> century. The paper discusses views on secularism and religion-based legal pluralism in the modern Muslim discourse and culture in the 19<sup>th</sup>, 20<sup>th</sup> and 21<sup>st</sup> century.

The important thing is that the real solutions had its roots and motivations in the culture and contemporary discourse. Secularism and other non-religious doctrines have already been discussed and presented in the political-

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1 Legally recognized denominations are so called 'People of the Book' (ar. *ahl al-kitāb*) which are Jewish and Christian denominations and, at most, Zoroastrians. Some Muslim denomination like Shiites may also be considered as legally recognized denominations. But all 'pagan' denominations as well as those Islamic denominations that have been considered as heresy were not legally recognized by authorities and had no privileges.

ly engaged literature of the 19<sup>th</sup> and early 20<sup>th</sup> century. The paper presents examples of such literature and points out the most influential authors and thinkers of that period. Beside the literature directly concerning the political issues, there were many examples of the popular literature (both poetry and prose) in the 19<sup>th</sup> and 20<sup>th</sup> century that had discussed the secular or religiously plural and already existing social and legal facilities.

Also other kinds of art consider the issues of secularism and religion-based legal pluralism. Television and cinema are the best exemplifications of such an interest within the Muslim cultural circle. Moreover, those humanities are the best illustration of which choice had been made in the society pictured by such a movie or TV series, highlighting some socially crucial aspects of the political and legal system.

At the beginning, the necessary historical background needs to be provided. As it was mentioned before, traditional legal system for Muslim countries is created on religion-based legal pluralism. It is typical for Muslim countries from the first caliphate up to the decline of the Ottoman Empire. This legal pluralism is derived from Arab conquest period. Then, in exchange for surrendering to new authorities, indigenous people were granted with some autonomy, that is to say the possibility of living in accordance with their own laws. All the more so because the conversions were not the aim of the conquerors at that time. The non-Muslim population had to pay a head tax, so called *ğizya*. Additionally, some restrictions were imposed on that population to prevent its members from rising above Muslims. However, they were subject to the law of their religion and its authorities in their own affairs<sup>2</sup>. In the Ottoman period that system assumed its classical form, being called *millet*. It consisted in that rights and duties of a certain person had varied, depending on denomination of that person. Also the catalog of prohibitions and crimes had been characteristic for a particular denomination. Obviously, there still were some rules universal for all members of the society as well as some rules of conduct in relations between members of different denominational groups but within certain denominations, there was even separate denominational jurisdiction. Because law in that period was customary and religious law, state and its authorities (mainly monarchs) had few tools to influence the law within the minor denominations. That in accordance with lack of some religious prohibitions guaranteed Christian merchants and Jewish moneylenders commercially strong position in the Ottoman Empire which in some as-

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2 *Pakt Omara*.

pects might have been better than situation of Muslim majority<sup>3</sup>. It has been noticed by authorities and in 19<sup>th</sup> century the religion-based legal pluralism in the Ottoman Empire has been reduced to pluralism in the matter of issues strictly related to religion and to personal law<sup>4</sup>. Legal pluralism has also been functioning under the European rule in the colonized territories<sup>5</sup>. In the 19<sup>th</sup> century and further to the second half of the 20<sup>th</sup> century, some European ideas, including secularism, has become popular in the Muslim world. Iran in the Pahlavi period was a secular state<sup>6</sup>. A doctrine of secular state has also been introduced in Turkey after 1924 by Mustafa Kemal Atatürk<sup>7</sup>. Secular model of legal system has been no longer based on legal particularism. Thus, it is based on the principle of law territoriality. State establishes rules equal for all that are within its territory, not depending on their denomination or other feature. Secularized legal systems were also functioning in all socialist Arab countries in the second half of the 20<sup>th</sup> century. In some versions, the state, keeping its only right to recognize or establish legal norms, may differentiate legal situation of person, depending on denomination, in the field of personal law, particularly in the matter of marriage. In the late 20<sup>th</sup> century and in the beginning of the 21<sup>st</sup> century the concept of political Islam and more traditional and conservative attitudes have become popular in Muslim societies. In accordance with that demand of establishing defferent jurisdictions, depending on denomination, in personal law, especially in the matrimonial matters, experience their renaissance. In some countries several steps towards to this goal has already been undertaken<sup>8</sup>.

All those mentioned above models of legal system have been illustrated in Muslim culture, particularly in described below literature, TV series and movies. But an important fact is also that some, above mentioned, historical processes have been strongly influenced by humanities, in 19<sup>th</sup> and 20<sup>th</sup> century especially by literature. That is the reason why the discourse in the subject matter, functioning in the Muslim culture in each single socio-political circumstances, is analyzed in the first place. That discourse is exemplified by certain pieces of politically engaged literature which has stimulated growth

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3 STAMATOPOULOS (2006), BRAUDE, LEWIS (1982).

4 GLIDWELL NADOLSKI (1977).

5 SMITH (2004), pp. 4-6.

6 MATIN-ASGARI (2002).

7 CHERRY (2002), pp. 21-23.

8 *Iraqis' New Personal Status*.

of some western origin concepts like secularism or nationalism within the Muslim political and legal culture.

At the turn of the 19<sup>th</sup> and 20<sup>th</sup> century, thinkers and authors of the modernist trend like ‘Abdūh, Al-Afġānī and Al-Kawākibī laid the foundations for appearing of secularism in Muslim world, proclaiming the need of reform and introducing many Western ideas into the discourse<sup>9</sup>. But they were not those, responsible for development of the secular doctrine in area of Islam. They have just created conducive circumstances. Arab political and legal thought was developing on the basis of engaged literature and books, published by thinkers and representatives of the doctrine. The importance of secularism within the whole discourse grew in the beginning of the 20<sup>th</sup> century. First and probably the most important representative of the secular concept was ‘Alī ‘Abd Ar-Rāziq, who criticized the concept of the Caliphate in his book *Al-islām wa-uṣūl al-ḥukm* (Islam and the Basis of Rule), issued in Cairo in 1925. He held that only the Prophet had power from the God. Due to that the Caliphate was always only a secular product of human political and social thought. As such the Caliphate had always been used for the interests of certain social groups. That should be the reason why the state authority ought to be built on the secular basis<sup>10</sup>. Farāġ Fawḍa was a supporter of the secular state and the democratic system, too. Secularism and democracy are the conditions of existence of the modern state as he wrote in 1987 in his *Hiwār ḥawla al-‘almāniya* (Discussion on Secularism). He wrote several books and articles in which he criticize the fundamentalists and argues that there had never been a state based on the rules of Islam because it is not possible as Islam is only a religion, not a theory of state and governance. Another important representative of the doctrine Hālid Muḥammad Hālid wrote many works. The most significant is *Min hunā nabda’* (Hence we Will Start), in which he criticizes theocratic rules, including any form of the caliphate, as resulting in the creation of authoritarian rule and oppression. Also well-known is his treatise *Dīmūqrāṭiya abadan* (Democracy Forever), in which he praises parliamentary democracy and attacks theologians who made up the caste of the clergy. He is also an author of *Ad-dīn fī hidmat aš-ša‘b* (Religion on Duty to the People), in which he derives the morality and principles of socialism from Islam in an interesting way<sup>11</sup>. On the one hand, works of these authors reflected a part of

9 BIELAWSKI (1986), pp. 102-104, DANECKI (1991), pp. 439-440 and 451-452.

10 DANECKI (1991), pp. 105-106. See also ‘ABD AR-RĀZIQ (1925).

11 DANECKI (2007), pp. 511-512.

contemporary trends and fit into the context of historical events in the Muslim world, on the other hand, these authors created a secular trend in Arab political and legal thought, creating a fertile ground for another secularized concept, the socialism. For example Maḥūd šaltūt was a representative of the doctrine who linked Islam to socialism<sup>12</sup>. In spite of the pure secularism and secularized current in socialism, there was another trend in Islamic world that seemed to be secular. This trend is nationalism. In this concept not a religious community but nation is the main factor, creating the society. Obviously, nationalists did not eliminate religion from public discourse but at least some of them were posing the nation over religion and its rules. One of them was Mustāfa Sa‘ādī Al-Ḥuṣrī. In his publications he regards Islam and any other religion as a component, subordinate to the nation. He was a supporter of the concept of the Arab nation, which includes Muslims as well as Christians and others<sup>13</sup>. In turn, traditionalists and representatives of fundamentalist thought do not pay much attention to the issue of the legal situation of religious minorities within the legal system, focusing on Islam and its role in the state and society. However, the traditional model built on the principles of Islam presupposes to a certain extent legal pluralism in the very nature of things. In addition, some war experiences indicate that the classic approach to legal status of the denominational minorities is still present. Although in wartime conditions the desire to impose poll tax on non-Muslims is obviously greater than the desire to guarantee them their freedoms.

A relatively new phenomenon within the Muslim discourse is the formulation of proposals of introduction of the religion-based legal pluralism to a limited extent in Western countries. These are particularly the countries in which a Muslim minority lives in a significant amount. For example, in the United Kingdom, such voices could have been heard since the 1970s. This pluralism would concern personal law and allow Muslims to conduct marital, family or even inheritance cases basing on Islamic law. And, of course, religion would be a factor conditioning the possibility of using such an option. This issue is still present in the modern discourse and is also widely discussed in the academic research<sup>14</sup>.

Politically engaged literature expressed general currents of its time. However, it also was a significant factor influencing changes within the Muslim

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12 DANECKI (1991), pp. 133-140.

13 DANECKI (2007), p. 513.

14 YILMAZ (2001), MENSKI (2008), pp. 281-309.

political and legal culture. But choice between secularism and religion-based legal pluralism is also choice between different social models. Those existing model are often illustrated by other humanities like movies or TV series which sometimes can also promote certain solutions.

Within the Arab cinematography, Egyptian cinema plays the most significant role. It is important also concerning the subject matter because of presence of a quite numerous Christian minority in Egypt. Those Christians are called Copts and have been present in the Egyptian culture since antiquity. Copts are obviously pictured also in Egyptian movies. In secular period of fifties and sixties of the 20<sup>th</sup> century Copts might have been recognized by a viewer only by their names because their characters did not differ from other people because cinema provided the society with the picture of the secular lifestyle. In later years, prejudices and stereotypes have gained importance. Movies started to marginalize Copts by presenting them mostly as friends or neighbors of main characters. Many movies, including documentaries, discuss the issue of Copts and their legal and social situation. Because of their number they appear in a significant part of Egyptian movies. *Copts Island* is one of the best and one of the most recommendable documentaries of Egyptian cinema, providing a fresh approach to Coptic Christians. The documentary from 2014 presents the situation of the Coptic minority in Egypt but also – what is the most important for the subject matter – highlights and discusses the presence of Copts in Egyptian arts, including the history of Egyptian cinema<sup>15</sup>. In spite of above, secularism became the dominant feature of Egyptian cinematography. The movies produced during the Nasser period presented a secularized society, but also played an educational and creative role. They were aimed at promoting specific attitudes and views aiming at consolidating the secular social model. Part of that trend was Egyptian feminist cinema, the goal of which was to fight for women's rights, to counteract discrimination, and to oppose and break the patriarchal social patterns derived from the religious tradition. An exemplification of that trend is one of the first feminist Egyptian movies, *Anā ḥurra* (I am free)<sup>16</sup>. The movie was directed by well-known Egyptian director Ṣalāḥ Abū Sayf who made a few more feminist movies in that period. Generally, Egyptian cinema in the Naser period and even later illustrated the secularized social model.

Iranian cinema, created during the Pahlavi period, is also worth mention-

15 *Copts Island*.

16 *Anā ḥurra* (1959).



ing. Iranian movies of that period were aimed at entertainment and presented secular model of state and westernized society, not avoiding discussion on some traditional and social issues. An example of such a movie may be *Qeysar* as well as *Ganj-e Qarun*<sup>17</sup>. Iranian movies after the revolution of 1979 illustrate the conservative model of the Islamic society. However, analysis of the status of the denominational minorities is not a core subject of those movies which focus on Muslim majority and sometimes elements of Islam in the everyday life. An exemplification of such elements may be a worldwide well-known movie, titled *Jodái-e Nadér az Simín* (A separation). There, one of the protagonists, a woman who works as a carer of an elderly person, asks the telephone imam about the extent to which she can perform activities related to care<sup>18</sup>. It highlights the increase in the importance of religion in everyday life.

Among the visual arts, TV productions, that are in fact akin to the cinematography, cannot be forgotten. In this category, it is particularly worth paying attention to the Turkish TV series, realized in the 21<sup>st</sup> century. The majority of contemporary Turkish drama series presents the image of a secularized society in which the issue of religious affiliation of protagonists are irrelevant and traditional religious norms (as e.g. obliging Muslims ban on drinking alcohol) are not reflected in the behavior of those protagonists. TV series called *Binbir Gece* (One thousand and one night) seem to be a good, though one of many, exemplification of that view<sup>19</sup>. It is so because contemporary Turkish drama series show secular model of state and secularized society just because these are the current social realities, especially in big cities. The transitional period of social change towards secularism is pictured in the background of action of another period drama, titled *Vatanım Sensin* (You are my homeland). The plot is set during the Turkish War of Independence. The population of Izmir is then still divided into Turks-Muslims and Greeks-Christians. Moreover, the Turkish people have their representation in their relations with the Greek authorities. However, the state and society itself are gradually becoming secularized. The series presents efforts to create a new secular Turkish statehood<sup>20</sup>. On the other hand, modern Turkish productions consider also the religion-based legal pluralism. This is what happens in historical series, picturing the past of the Ottoman Empire. The best

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17 *Qeysar* (1969), *Ganj-e Qarun* (1965).

18 *Jodái-e Nadér az Simín* (2011).

19 *Binbir Gece* (2006-2009).

20 *Vatanım Sensin* (2016-2017).

exemplification of such series is worldwide well-known historical series, titled *Muhteşem Yüzyıl* (The magnificent century). Plot of this series is set in the 16<sup>th</sup> century Ottoman Empire. Due to that this historical series illustrates the religion-based legal pluralism as a legal system model. Mostly the issues related to Islam and importance of representatives of Islamic jurisprudence are exposed in that historical soap opera. However, the series presents also the fact that non-Muslim denominational minorities are not bound by the restrictions that limit behavior of Muslims. In one of the episodes of that series, sultana Hürrem borrowed Money on interest from Jewish usurer as well as the prince Bayezid who uses the services of usurers some time later. In another one, Sultan Suleiman's son, prince Selim goes to a farm of a Greek woman (a Christian woman) where he starts to drink wine which she completely legally produces<sup>21</sup>. It is worth remembering that both, usury services as well as producing and trading in wine, were not allowed to Muslims in the presented period.

Therefore, in summary, taking into account information provided above, it is necessary to state what follows. Secularism was strongly present in the Muslim political and legal discourse of the 20<sup>th</sup> century. Politically engaged literature laid the intellectual foundations for the development of secularist concepts in contemporary Muslim and Arab thought. Nevertheless, from a certain point of view, this literature was already created in the context of the ongoing secularization of relations in Muslim countries. The end of the 20<sup>th</sup> century brought the development of this doctrine to an end. However, religion-based legal pluralism did not fully take its place, because traditionalist thinkers are more focused on the role of Islam itself in the state. Religion-based legal pluralism is now more willingly discussed in the context of the legal situation of Muslim minorities in Western countries. As for visual arts, such as cinema or television, they were used to promote specific attitudes and views, especially during the Naser period in Egypt. Generally, however, they reflect the described reality, either historical one or that currently existing in the country of production. Visual arts' manifestations can be a good exemplification for both secularism and religion-based legal pluralism. Muslim culture is very rich and can bring a lot of interesting topics for analysis of the interference between law and humanities. Law and humanities in the sphere of Muslim culture are not limited to the issues of criminal law and family matters. In the light of the above, it can be seen that many other aspects of legal culture, such

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21 *Muhteşem Yüzyıl* (2011-2014).

as the structure of the legal system or the legal position of denominational minorities, can be discussed at the meeting of law and humanities.

The paper is introductory and discusses the subject across the board, being just a first step to further research in this area. It shall be an inspiration for a wider group of researchers to explore the connections between law and humanities within the Muslim civilization. Indeed, this is an interesting and important issue, especially since literature and other humanities illustrate the social attitude to the law and social notion of it as well as the law can change, when influenced by literature and other humanities. Such a conclusion may be drawn from this article. It also applies to the shaping of legal systems of Muslim countries.

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## Chapter IX

### Law and Political Practice





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### 1. *Introduction*

The beginning of medieval Serbian mining was connected with the settlement of the Saxons in the Serbian territories. The Saxons in Serbia were mentioned in the sources for the first time in a Charter of King Stefan Uros I (1246-1276) in the middle of 13<sup>th</sup> century.

According to the majority of Serbian scholars, Saxons, at the time of their settlement, gained a written charter or charters granting privileges. Allegedly, these privileges were: freedom of confession, mining concessions, privilege to mixed jury or mixed court in litigation with Serbs, privilege of autonomous judiciary within the Saxon community and the right to self-government. The last one will be the subject of this paper.

At the time of the Saxon settlement, there were no urban settlements in Serbia with the exception of autonomous littoral communities at the Adriatic see<sup>1</sup>. The existing settlements had no legal status different from the one of villages, no specific legal organization testified in the sources, nor special legal authorities.

The situation changed after the settlement of the Saxons. They founded communities whose predominant economic purpose was to dig out as much ore as possible and to melt it and to extract pure metal, mostly silver and gold. Therefore, the existence of this settlement was determined by the mining production. Firstly, they had to be founded near metal deposits. Secondly, they lost their reason of existence in one exact place after the exhaustion of the corresponding mine. Hence, some of these settlements were founded in the mountain areas, unfriendly for living or to any other economic activity but mining. That was the reason why some of these settlements were abandoned after disappearance of gold and silver in the surrounding area<sup>2</sup>.

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1 After the Saxon settlement there were two new categories of urban settlement. One of them were the towns taken over from the Byzantine Empire, such as Skoplje or Ser. The second type were the XV century capitals Belgrade and Smederevo. On the legal status of the inhabitants of the Serbian medieval urban communities in the recent literature ШАРКИЋ (2011), pp. 17-27.

2 In the paper will be considered the legal organization of five communities: Brskovo,

It is expected that such a community, founded and existing predominantly for economic purposes, had some legal organization. The sources support this expectation. Legal authorities were testified in five Serbian medieval mining towns. These were Brskovo, Rudnik, Trepča, Srebrnica and Novo Brdo. The available sources were mostly official records preserved in the Dubrovnik archive, some Serbian notarial documents and a charter issued to Novo Brdo at the beginning of the 15<sup>th</sup> century<sup>3</sup>.

This paper will analyse only the legal authorities of the whole community. There were also tax collectors (tax lessees) and *urburars*, with some specialised judicial and executive competences. Since they were narrowly related to tax collection and ore exploitation, the activities not necessarily related to the community, they will not be considered in this paper.

## 2. Sources

### 2.1. Brskovo

Brskovo is first Saxon and mining settlement mentioned by name in medieval Serbia. The location of this town is unsecured, although the dominant opinion is that it was near the town of Mojkovac in modern Montenegro. The town was mentioned for the first time in the second part of XIII century. Due to exhaustion of ore, it was probably abandoned before the dissolution of medieval Serbian state<sup>4</sup>.

There are two important sources from Brskovo at the end of the 13<sup>th</sup> century. First is a letter from 1280 mentioning the *comes Vreibergerius*<sup>5</sup>. Another letter from October 1282 contains the words *capellanus domini Fabrigar, comitis in Brescoa*<sup>6</sup>. It is very likely the same person is mentioned in both of

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Rudnik, Trepča, Srebrnica and Novo Brdo. Two of them (Novo Brdo and Brskovo) were placed above one thousand meters above sea level. One (Rudnik) was at around seven hundred meters. Consequently, only two of the settlement still exist on the same place. These are Srebrnica and Trepča. The other three were abandoned long time ago, since there are no more mines in the surrounding. There are the villages Rudnik and Novo Brdo near the medieval towns, but it is even disputed were the oldest one (Brskovo) was.

3 Author have had no opportunity to do research in the mentioned archive, so the paper relies on the published results of Mihailo Dinić.

4 Динић (1955), pp. 3-4; Ћирковић, Михаљчић (1999), pp. 59-60; Ћирковић, Ковачевић-Колић, Ћук (2002), pp. 21-32.

5 Чremoшник (1932), p. 36.

6 *Ibidem*.

the documents. It indicates that the town of Brskovo in the eighties of the 13<sup>th</sup> century had a *comes*<sup>7</sup>.

## 2.2. Rudnik

Unlike Brskovo, the place of Rudnik is very well documented. It is on the mountain of the same name eighty kilometres south of Belgrade. It was mentioned for the first time in 1293<sup>8</sup>. Near the location of the medieval town, there is still a village Rudnik in the municipality of Gornji Milanovac.

The sources about Rudnik legal authorities cover almost a century and a half, from the beginning of the 14<sup>th</sup> to the middle of the 15<sup>th</sup> century. In 1312 a *judex* appeared in Rudnik for the first time<sup>9</sup>. According to the records from Dubrovnik there is a *comes de Rudenicho* in 1349<sup>10</sup>. In 1402 and 1403 there was a *kefaliya* in Rudnik<sup>11</sup> and in 1414 and 1422 there was a *chonte*<sup>12</sup>. In 1422 we have a complaint of a citizen of Dubrovnik to his government about tax collector in Rudnik, telling about *knez* and *kefaliya* (both of them)<sup>13</sup>. In 1457 *congregatio*, *conte et zentilhomini* were mentioned in Rudnik<sup>14</sup>.

## 2.3. Trepča (and Belasica)

Trepča was one of the first mentioned Saxon mining towns in Serbia, appearing for the first time in the sources in 1303<sup>15</sup>. Belasica was a small mining community near Trepča, mentioned for the first time in Dubrovnik sources in 1423<sup>16</sup>.

In 1407 there was a letter of the *knez* of Dubrovnik to the *kefaliya* of Trepča<sup>17</sup>; two years later another letter telling about the servants of *kefaliya* of

7 The overview of the legal authorities of Brskovo are given in the Table 1.

8 About medieval Rudnik see Динић (1962), pp. 1-26; Ћирковић, Михаљчић (1999), pp. 245-247.

9 Јиреџек (1915), p. 88.

10 Динић (1962), p. 14.

11 *Ibidem*; Младеновић (2007), p. 36; Стојановић (1929), p. 195.

12 Динић (1962), p. 14.

13 Споменик 11/1892, 72.

14 Динић (1937), p. 234. The overview of the legal authorities of Rudnik are given in the Table 2.

15 Динић (1955), pp. 4-5; Ћирковић, Михаљчић (1999), pp. 300-301.

16 Ћирковић, Михаљчић (1999), p. 29.

17 Благојевић (2001), p. 274.

Trepča<sup>18</sup>; in 1410 a notarial document in Serbian from Trepča mentioning a *kefalija*<sup>19</sup>; finally, in 1450 in a message from Dubrovnik to the Serbian *despot* we found the *kefalija* of Trepča<sup>20</sup>.

There were also two suits of Dubrovnik citizens from 1426 telling about litigations before «the *kefalija* of the place» in Belasica<sup>21</sup>. Since it was usual that *kefalija* had several towns under his rule, maybe it was the same *kefalija* for Trepča and Belasica.

#### 2.4. Srebrnica

Srebrenica was a mining community founded in the medieval Bosnian state. Around 1412 it came under sovereignty of the despots of Serbia until 1439, when it came under Turkish control. In the period from 1444 to 1451 it was under Serbian and Bosnian rule or in the condominium of the two states. From 1451 to 1458 it was under Serbian and from 1458 to 1462 under Bosnian control, when it became a part of Ottoman Empire<sup>22</sup>. Srebrnica exists now in eastern part of Republic Bosnia and Herzegovina under the similar name of Srebrenica.

At the end of the 14<sup>th</sup> century there are two mentions of the *purgari* in the Dubrovnik records. The first one is from 1381 and second one from 1395: both are written in Latin<sup>23</sup>.

In 1417 there was an investigation conducted by Dubrovnik authorities about the tax collectors in Srebrnica. In one of the records a *chonte* and *purgari* are mentioned<sup>24</sup>. There was also a court record of statement of a citizen of Dubrovnik from 1423 saying that he acted as a *comes (...) cum (...) iudicibus*<sup>25</sup>. According to a Dubrovnik record written in Italian the same year there was a contract of purchase of a house in Srebrnica concluded with *guarentizia* of

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18 *Ibidem*.

19 БУБАЛО (2004), p. 255.

20 Динић (1978), p. 403. The overview of the legal authorities of Trepča are given in the Table 3.

21 Споменик 11/1892, p. 77.

22 About the history of Srebrnica and the surrounding area see Динић (1955), pp. 31-100; КОВАЧЕВИЋ-КОЈИЋ (2010); ЋИРКОВИЋ, МИХАЉЧИЋ, (1999), pp. 277-281.

23 Динић (1955), p. 18.

24 Динић (1955), p. 69.

25 Динић (1955), p. 14.

*voivoda*, *chonte*, four *purgari* and *altri gintilhomini*<sup>26</sup>. For 1433 there was a record in Italian about a complain of the novelties in Srebrenica, concerning the taxes. A *vojvoda* and two *purgari* were mentioned<sup>27</sup>. There is a record on a lawsuit in Latin from Dubrovnik from 1437 telling about the litigation in front of *domines purgares Strebernize*<sup>28</sup>. In a letter and a subsequent lawsuit from 1438 a citizen of Dubrovnik said that he was imprisoned by *gragani* (in a complain written in Serbian)<sup>29</sup>. In a record in Latin from 1439 were mentioned *pristavi* (executive organs) of a *vojvoda* and *purgari*.<sup>30</sup> There was a letter in Serbian from 1447 addressed to Dubrovnik issued by two *knezovi* and *purgari*<sup>31</sup>. A testament of a Dubrovnik citizen from 1452 written in Italian noting the *XII bogesani* and a few lines after *XII boni homini*<sup>32</sup>. For 1457 there was an interesting trial in Srebrnica. The preserved documents indicate the exact composition of judiciary collegia. In the document written in Serbian *knez*, *vojvoda*, *purgari* and nobility of Srebrnica are mentioned<sup>33</sup>. The inconsistency in the mentioning of the *vlastela*, Dinić uses to conclude, that the mentioned nobility (*vlastela*) was in fact the *prurgari*<sup>34</sup>. Records about the same litigation from Dubrovnik from the same year written in Latin mention that it was conducted in Srebrnica *coram iudicibus*, and that the judgment was brought by the *officiales* of Srebrnica. Dinić believes that the *officiales* and the *iudices* of Srebrnica were also *purgari*<sup>35</sup>. But, one should not forget that *knez* and *vojvoda* were also the officials of the community and members of the court as well, so it not possible to conclude that the only *purgari* were designated by these two terms<sup>36</sup>.

At the end of this chapter is to be noted a mention in of the certain *commes* and *chonte* in Crnča at 1440 and 1441<sup>37</sup>. Crnča was and still is a village near Srebrnica across the river Drina, on its Serbian coast.

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26 Динић (1955), p. 16.

27 Динић (1955), p. 19.

28 Динић (1955), p. 21.

29 Споменик 11/1892, p. 80; Динић (1955), pp. 13-14.

30 Динић (1955), p. 16.

31 Споменик 11/1892, 86; Динић (1935), p. 169.

32 Динић (1955), pp. 16-17.

33 Споменик 11/1892, 87.

34 Динић (1955), p. 15.

35 *Ibidem*.

36 The overview of the legal authorities of Srebrnica are given in the Table 4.

37 Динић (1955), p. 73.

2.5. *Novo Brdo*

Novo Brdo was the most important mining area and mining community at the 15<sup>th</sup> century Balkans. It was mentioned for the first time in 1326. It was under Serbian control until 1455, with exception of the period 1441-1443 and a short period in 1444 when it was under Ottoman control. It was settled in a mountain area near a modern village of the same name in the eastern part of Kosovo<sup>38</sup>.

Citizens of Dubrovnik complain to *kefali* and *purgari* of Novo Brdo in a document in Serbian, about imprisonment of a citizen of Dubrovnik in 1388<sup>39</sup>. In 1407 there is a *conte* in Novo Brdo in a Dubrovnik letter to tax collectors<sup>40</sup>. In 1411 a *vojvoda* of Novo Brdo was mentioned in a testament of a Dubrovnik citizen<sup>41</sup>. In 1412 *vojvoda*, *knez*, *protopop*<sup>42</sup> (as a part of judicial collegia) and twelve *purgari* are mentioned in the Mining Code of Stefan Lazarević<sup>43</sup>. In 1414 there were *purgari* in a sue of a Dubrovnik citizen<sup>44</sup>. There are two letters from late 1416 telling about complaints about *vojvoda* in Novo Brdo and five of them from the subsequent year of the same subject<sup>45</sup>. A letter was addressed to *vojvoda* of Novo Brdo in 1421 by Dubrovnik. There is a *vojvoda* in a letter from the *despot* to Dubrovnik 1422<sup>46</sup>. In 1427 a citizen of Dubrovnik wrote a letter complain that he was imprisoned by a *vojvoda* of Novo Brdo<sup>47</sup>. In 1432 there were three letters about a petition of the Dubrovnik citizens to the *Despot*, where a *vojvoda* and a *conte* are mentioned<sup>48</sup>. In 1433 there were several letters telling about the same problem, where a *vojvoda* and a *conte* are again noted<sup>49</sup>. There is a notarial document from 1434 mentioning *vojvo-*

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38 About the history of Novo Brdo and the surrounding area see Динић (1962), pp. 27-95; Радолчић (1962), pp. 1-10; Јовановић (2004); Ћирковић, Михаљчић (1999), pp. 198-202.

39 Динић (1955), p. 5.

40 Динић (1962), p. 72.

41 *Ibidem*.

42 *Protopop* was an orthodox vice bishop.

43 Радолчић (1962), p. 51, p. 52 and p. 55. On the possible different datation of the charter see Катанчевић (2016).

44 Динић (1962), p. 75.

45 Динић (1955), pp. 52-53; Младеновић (2007), pp. 68-72.

46 Динић (1962), p. 72; Младеновић (2007), pp. 74-75.

47 Динић (1962), p. 73.

48 Динић (1955), p. 66.

49 *Ibidem*.

*da*, *protopop* and *knez* as witnesses of the act<sup>50</sup>. There is also a mention of a certain *purgar* from novo Brdo in Lukarević's account book during 1430s. It is interesting that he was a citizen of Split, although an official of Novo Brdo<sup>51</sup>. There is a record in Dubrovnik from 1440 telling about a complaint to the *maiores civitatis*<sup>52</sup>. A record also from Dubrovnik from 1441 testifies about an accusation in front of *domini anciani civitatis*. However, this term is not enough definite to give the reason to conclude which officials were exactly mentioned<sup>53</sup>. In 1444 there was a letter of *knez* of Novo Brdo to Dubrovnik<sup>54</sup>. In 1454 *vojvoda* of Novo Brdo was sending a deposit to Dubrovnik<sup>55</sup>.

Apart from these, there are a lot of sources telling about the legal authorities of Novo Brdo in general terms as *gubernatores*, *valiosi*, *zentilhomini* and others figures<sup>56</sup>. Because of the uncertainty about the exact authorities designated by those names, those sources are not of a considerable use for this analysis<sup>57</sup>.

Table 1: LOCAL AUTHORITIES IN BRŠKOVO

YEAR	TERM	SOURCE
1280	Comes	Letter (Dubrovnik)
1282	Comes	Letter (Dubrovnik)

Table 2: LOCAL AUTHORITIES IN RUDNIK

YEAR	TERM	SOURCE
1312	Judex	Official record (Dubrovnik)
1349	Comes	Private letter (Dubrovnik)
1402	Kefalija	Guarantee about paid debt (Dubrovnik)
1403	Kefalija	Testament (Dubrovnik)
1414	Chonte	Private letter (Dubrovnik)

50 Споменик 3/1890, 51; БУБАЛО (2004), p. 258.

51 Динић (1955), p. 17; Динић (1962), p. 74.

52 Динић (1955), p. 15.

53 Динић (1955), p. 16.

54 Динић (1962), p. 61.

55 Динић (1955), p. 64.

56 Динић (1955), p. 74.

57 The overview of the legal authorities of Novo Brdo are given in the Table 5.

1422	Knez and kefalija	Legal sue (official record, Dubrovnik)
1422	Chonte	Private letter (Dubrovnik)
1457	Congregatio, conte et zentilhomini	Renouncement of a right of mine exploitation (official record, Dubrovnik)

Table 3: LOCAL AUTHORITIES IN TREPČA

YEAR	TERM	SOURCE
1407	Kefalija	Letter to kefalija (Dubrovnik)
1409	Kefalija	Letter to the master of the realm (Dubrovnik)
1410	Kefalija	Notarial act (Dubrovnik)
1450	Kefalija	Letter to Despot Đurađ (Dubrovnik)

Table 4: LOCAL AUTHORITIES IN SREBRNICA

YEAR	TERM	SOURCE
1381	Purgar (a witness)	Court record from Dubrovnik
1395	Purgar (a debtor)	Record from Dubrovnik
1417	Chonte, purgari	Testimony in an investigation (Dubrovnik)
1423	Comes, judices	Counter-statement (Dubrovnik)
1423	Voivoda, chonte, purgari, altri gintilhomini	Record about a purchase of a house (Dubrovnik)
1433	Voivode, purgari	Complain about the novelty (Dubrovnik)
1437	Purgari	Lawsuit (Dubrovnik)
1438	Gragani	Lawsuit (Dubrovnik)
1439	Vojvoda, purgari	Execution of verdict (letter to Dubrovnik)
1447	Knez, purgari	Settlement (letter to Dubrovnik)
1447	Two knezovi, purgari	A letter to Dubrovnik
1452	XII borgesani, XII boni homini	Testament (official record, Dubrovnik)
1457	Knez, vojvoda, purgari, vlastela	Court records (Dubrovnik)
1457	Officiales, judices	Judgement (Dubrovnik)



Table 5: LOCAL AUTHORITIES IN NOVO BRDO

YEAR	TERM	SOURCE
1388	Kefalija, purgari	Petition of Dubrovnik citizens
1407	Conte	Letter to tax collectors (Dubrovnik)
1411	Vojvoda	Testament (Dubrovnik)
1412	Knez, vojvoda, sabor, protopop sud (= court)	Charter of Despot Stefan to Novo Brdo
1416 (twice)	Vojvoda	Official record of Veće umoljenih (Dubrovnik)
1417 (five times)	Vojvoda	Letters to Despot Stefan (Dubrovnik)
1421	Vojvoda	A letter of Dubrovnik to the vojvoda
1422	Vojvoda	A letter of Despot Stefan to Dubrovnik
1427	Vojvoda	A legal sue (Dubrovnik)
1432 (three times)	Vojvoda, conte	Petition to Despot Đurađ (Dubrovnik)
1433 (two times)	Vojvoda, conte	Petition to Despot Đurađ (Dubrovnik)
1430s	Purgar	Lukarević's account book
1434	Vojvoda, protopop and knez (as witnesses)	Notarial document
1440	Maiores civitatis	Lawsuit (Dubrovnik)
1444	Knez	Official letter to Dubrovnik
1454	Vojvoda	Record about a money deposit (Dubrovnik)

### 3. *Purgari*

The name *purgar* (pl. *purgari*) comes from German *Bürger* (citizen). In most of the sources written in Serbian, Latin and Italian usually there is no translation of the word in those languages. All of them refers to *purgar* as something different from a citizen. It indicates that they understood under that name some kind of municipality official. It is a member of a kind of city

council with judiciary and administrative competences, taken from the Saxon medieval mining law. There were a council of twelve of *purgari* in Srebrnica and Novo Brdo, just as in Saxon mining communities<sup>58</sup>.

However, the low frequency of the appearance of the *purgari* in the sources surprises. One expects to find them in all the communities with Saxon members, which is not the case. In fact, in medieval Serbia there was not a trace of *purgari* outside of Novo Brdo. They appeared in Srebrenica, but before it became a part of Serbia, and as it is expected, they remain there after the fall under the Serbian rule. In 1303 there is first mention of Saxons in Trepča, but there is not a single source indicating the *purgari* there. Similar was in Rudnik. The community was known from 1293 and could be traced until the end of medieval Serbian state, but still there is no trace about *purgari*, with exception of a notion of *zentilhomini*, which doesn't necessarily indicate the *purgari*.

The time of the first testimonies about *purgari* also confuses. In the medieval Serbia they were mentioned for the first time as late as 1388. If one accepts the commonly advocated thesis that Saxon came during the rule of King Stefan Uroš I (1243-1276) it means that more than a century after the Saxon settlement there was no trace of *purgari*. This opens a lot of presumptions and questions. Since *purgari* was the only considerable Saxon legal influence in the organization of urban communities in medieval Serbia, one may say that there was not any influence of that kind until the late 14<sup>th</sup> century, or that the influence came at least a century later than it was expected. The miners and the mining businessmen were very mobile at that time and it was possible that they brought even legal institutions to the new communities they established. The most important mining community (Novo Brdo) is expected to have the most developed and sophisticated legal organization. Maybe that was the reason that *purgari* existed only there and it also possible that the establishment of the *purgari* council was result of a foreign influence latter that Saxon settlement in the middle of 13<sup>th</sup> century, on one hand, and of a greater need of the administration of the biggest mining community in Serbia, on the other.

In the neighbour Kingdom of Hungary, as well as in the contemporary

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58 JIREČEK (1900), p. 198; Динић (1955), pp. 10-19 and 94; Динић (1962), pp. 74-75; МАРКОВИЋ (1985), p. 55; КОВАЧЕВИЋ-КОЛИЋ (2010), pp. 123-124; ЋИРКОВИЋ, МИХАЉЧИЋ (1999), pp. 604-605; ДАНИЛОВИЋ (2002), pp. 237-238.

Czechia, the *purgari* were elected by the citizens of the town<sup>59</sup>. There is no source confirming or denying such practice in Serbia. Because of the lack of the sources and appointment of *kefalija* and *vojvoda* by the ruler on the other side, one may believe, that *purgari* were the body of local autonomy.

Since the role of the collegium of *purgari* was predominantly judicative, one may conclude that the sources referring to them when speaking of *judices* in Srebrnica, or *sud* (court) again in Srebrnica and Novo Brdo. Maybe they were the mentioned *citadini* and *gragani* in Srebrnica, were the term *purgar* appeared translated in Italian and Serbian, which would be very rare usage of the words. The *purgari* could be the mentioned *XII borgesani* and *XII boni homini*, but they could be also the jury composed according to the provision of the Code of Emperor Dušan. Unlike Srebrnica and Novo Brdo in a letter of 1312 from Rudnik, there is just one *judex*. This could also testify that there was no Saxon influence in the structure of the legal authorities of Rudnik.

#### 4. *Kefalija*

This legal institution and its name was taken from Byzantine Empire in 13<sup>th</sup> century. It was present in the Serbian states until the very end of the 15<sup>th</sup> century and their fall under the Ottoman Empire. *Kefalija* was the governor of an area of the realm often including one or even several towns. He was always appointed by the ruler. His competences were of judiciary, police and defence kind<sup>60</sup>.

According to the sources, there was *kefalija* in Rudnik, Novo Brdo and Trepča. In Srebrenica and Brskovo there were no traces of *kefalija*. The explanation could be the historical one. At the time of the founding the municipality in Brskovo, the institution of *kefalija* haven't been yet taken from Byzantines. On the other hand, during the forming of Srebrenica community it was part of Bosnian realm, not knowing the *kefalija* at that time.

#### 5. *Vojvoda*

The term *vojvoda* means military commander. Although there were *vojvode* as commanders before the time they appeared in the mining municipi-

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<sup>59</sup> Cfr nt. 57.

<sup>60</sup> Благојевић (2001), pp. 246-285; Динић (1955), p. 93; Ковачевић-Колић (2010), pp. 125-126; Ћирковић, Михаљчић (1999), pp. 292-295.

palities, the *vojvode* in the towns were commanders of the military county. It was the result of the militarisation of the country conducted at the very beginning of the 15<sup>th</sup> century<sup>61</sup>.

Not all of the mining towns were seats of the counties and *vojvode*. Just the two largest: Srebrenica and Novo Brdo. As one could see from the sources, *vojvoda* had some judiciary powers, apart from the duty to defend the area and to rule it in the name of the *despot*. In the charter issued by *despot* Stefan to Novo Brdo were specified the taxes for the material support of *vojvoda*<sup>62</sup>.

## 6. *Knez*

*Knez* is an old title with different meaning in the medieval Serbia. First it was the title of the ruler, then of a part of the realm. During 14<sup>th</sup> century it was the highest rank of the nobleman in the norther parts of the country, corresponding to the title of the *despot* in the south. At the end of the century it become again the title of the ruler. At the same time, it was the title of the chief of a nomadic shepherd group, a village or a governor of the town on the Adriatic coast, appointed by the ruler<sup>63</sup>. *Comes*, *chonte* and *conte* were the Latin and Italian words for *knez*.

One can notice, that the first legal body in the mining communities mentioned in the sources was the *knez* and that it has been existing until the end of the Serbian medieval state. The question remains whether he was elected by the citizens or appointed by the ruler. *Knez* of littoral municipalities was appointed by the ruler. *Knez* of the villages and nomadic groups was elected by his neighbours. On the other hand, *knez* was mentioned together with *vojvoda*. It is certain that *vojvoda* was always appointed. It may indicate *knez* might be a body of local self-government, elected by the inhabitants, while *vojvoda* was appointed by the ruler. But while *vojvoda* and was a commander of the part of the territory of the realm, *knez* had authority only within the community, probablbly a town and surrounding area. However, besides the arguments *pro* and *contra* the *knez* as a kind of self-government one should

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61 Благојевић (2001), pp. 287-297; Динић (1962), pp. 72-75; Марковић (1985), pp. 54-55; Ћирковић, Михаљчић (1999), pp. 72-73 and 95-97; Даниловић (2002), pp. 235-236.

62 Радолчић (1962), pp. 51-55.

63 Благојевић (2001), pp. 49-55; Динић (1955), p. 93; Динић (1962), pp. 72-75; Марковић (1985), p. 55; Ћирковић, Михаљчић (1999), pp. 299-301; Ковачевић-Колић (2010), pp. 124-125; Даниловић (2002), pp. 236-237; Ћирковић (1997), pp. 346-347.

not forget that it seems that the organisation of the communities was not unified. Therefore, there is possibility that sometimes and somewhere *knez* was appointed by the ruler and in some cases elected by the citizens.

### 7. *Sabor*

*Sabor* or assembly was an old institution in medieval Serbia originating from customary law. There were state assemblies, electing the archbishop, electing or confirming the ruler, proclaiming the laws. At the same time, there were the village assemblies solving the problems of the villages<sup>64</sup>.

It is very interesting that the assembly of the town was mentioned only twice. In the charter of Novo Brdo and in the Rudnik 1457, first time as *sabor*, secondly as *congregatio*, which is the Latin word for *sabor*. It is not known whether the members of the assembly were all of the male inhabitants of the town, or some of them. It is possible that the mentioned assemblies of Rudnik and Novo Brdo had their roots in the old institution of a village *sabor*.

According to the sources there were no certain competences of the *sabor*. In the charter to Novo Brdo it was mentioned only as a body demanding the charter. In Rudnik it was only a witness of an act. Maybe it had an elective function, choosing *purgari* or *knez*. However, it didn't appear as an important legal body.

### 8. *Concluding remarks*

At the end one can conclude that the structure of authorities of medieval mining communities in Serbia was not unified in all municipalities and that it changed over time. It speaks of legal particularity and spontaneous customary law development rather than a unique written charter giving a privilege to the self-government to the certain group which founded those communities.

The legal organization was also under different legal influences. There was the institution of *kefaliје*, taken from Byzantine Empire, the *purgari*, picked up from the Saxon customary law, the institution of *knez* and *sabor*, transplanted from Serbian customary law and the newly established institution of *vojvoda*. However, the Saxon influence in the mining communities in the Serbian state was later and smaller than expected. There was no testified Saxon

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<sup>64</sup> ТАРАНОВСКИ (1996), pp. 225-262; ЋИРКОВИЋ, МИХАЉЧИЋ (1999), pp. 222-228; ЋИРКОВИЋ, КОВАЧЕВИЋ-КОЈИЋ, ЋУК (2002), p. 92; ЋИРКОВИЋ (1997), pp. 336-340 and 347.

influence outside of Novo Brdo and even there more than century after the first Saxon settlement. Srebrnica was founded and legally constituted outside of the state and that taken over.

Also, the titles of the governors of the towns are to be considered. In Trepča there was only *kefalija*, in Srebrnica only *knez*. In Novo Brdo in 1388 *kefalija* and from 1407 only *knez*. In Rudnik at the beginning and at the end of the considered period was only a *knez*, but between 1402-1422 there was alternately *knez* and *kefalija*. However, there is only one source mentioning both of them. In 1422 there was a complaint of man telling that he was deposed of something «which is given to him by (...) *knez* and *kefalija* of Rudnik»<sup>65</sup>. The text could indicate that there was a *kefalija* and a *knez* at the same time, or that a same person was *knez* and *kefalija*. That could explain the usage of the different titles between 1402-1422. Maybe there was no both *knez* and *kefalija*, but the governor of the community bared the different title, maybe depending on the area of his competence outside of the community. However, with an appointed representative of a ruler with vast competences in the town, independently from his tile, the autonomy of the mining communities, if existed, was very limited.

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<sup>65</sup> Споменик 11/1892, p. 72.

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## THE STRUCTURE OF THE GOVERNMENT AND THE PRESS \*

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The press is said to be the fourth branch of powers. That was the reason why I decided to examine the connection and relationship of the government and the press. I have chosen a point of view which is very much different from the usual: I am going to examine the press' relation and reaction to the changes in the ministerial structure of the government. There is an obvious connection between the government and the press. Of course, the main content of the daily press, the daily newspapers is highly influenced by the activities of the government, the activities of the ministers, the members of the government.

Thus, the connection between the structure of the government and the press is not so obvious. It is not a purely political question, a change in the structure of the government is a way of exercising the government's power to shape its own organisation. Basically, it is an administrative question, governed by administrative law and constitutional law. Perhaps it is not enough interesting for the press to deal with.

I have chosen three different topics to discuss here connected somehow to the relationship of the government and the press. The first one is the first change in the names of the Hungarian ministries in 1889; the second one is – in my opinion – the greatest change in the Hungarian ministerial structure in and in the power of the government to shape its own structure in 1917, and the third one is a public debate in the press about the need of given positions of ministers without portfolio.

### *1. The changes of 1889*

In 1889 the Hungarian government decided to change the names of two ministries. The original names were determined by act III of 1848 on the independent Hungarian responsible government, which were the ministries

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«for public work and means of transportation and sailing» and «for agriculture, industry and commerce»<sup>1</sup>. The new names of the ministries were much simpler: ministry for agriculture and ministry for commerce.

The newspapers were filled with the reports on the parliamentary debate on the bill changing the names of the two ministries. The bill was sent in personally by the prime minister, Kálmán Tisza<sup>2</sup>. The first to comment the bill was a representative of the opposition, József Madarász who was said to be one of the old fighters for independence ideas<sup>3</sup>. He said that the new names for the ministries were very unfortunate, that is why he was not for the bill. His main counterargument was that there would be no reference to the industry with the new names. According to his position, if the reference to the industry was so important in 1848 that it was put into the name of a ministry, then it must be of the same importance in 1889. He hoped that the name-change was not representing the government's aim to act in favour of Vienna with expressing that the industry was not as important as it was in 1848. His opinion was that it would be better if the ministry for agriculture, industry and commerce was separated to two single ministries: the ministry for industry and commerce and the ministry for agriculture, of course only in the case if there were enough funds in the national budget for increasing the number of ministries<sup>4</sup>. I think it is important to highlight the symbolic significance of the names that were created in 1848. The name 'ministry for agriculture, industry and commerce' held the word 'industry' in it since 1848. According to representative Madarász it was an achievement of the 1848 revolution of Hungary, and as an achievement of the revolution it is taken to a pedestal. Later, in 1933, literally the same arguments came up, when the government intended to create a single and separate ministry for agriculture. Again, the press had a leading role in recalling to old memories of this debate. In 1933, the names used in Act III of 1848 were said to be the obstacles of setting up the separate ministry for agriculture. The supporters of the government's initiative, who were supporters of the orthodox independence policy, stuck not just to the spirit of Act III of 1848, but to the words of it as well<sup>5</sup>. In 1933 there was no real solution for the problem, but in 1889 the government's original idea was successful.

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1 Act III of 1848, §14, c-d.

2 Pesti Hírlap, Year XI, Issue 100, 11<sup>th</sup> April 1889, 1.

3 Köztelek, Year XLIII, Issue 47-48, 11<sup>th</sup> June 1933, 420.

4 Protocols of the House of Representatives 1887-1892, vol. XI, 73.

5 Köztelek, Year XLIII, Issue 47-48, 11<sup>th</sup> June 1933, 420.

In the parliamentary debate of Act XVIII of 1889 Géza Polónyi was the second and the last to make remarks to the bill. Géza Polónyi was an opposition party representative, who, according to the newspapers, was very much hated by both the government and the governing party<sup>6</sup>. He was not for the bill, because he presumed to know the real reasons of the change in the ministerial structure, in the names of the ministries. According to the government's reasoning, the main aim was, in conjunction with the change of the names, the change of the sphere of action. But representative Polónyi's opinion was that the government wanted the rearrangement of the spheres of action only because they wanted to act in favour of the great landowners. This was the only way to ensure that the minister with the new competencies might act for the great landowners. He said that this had to be true, because otherwise the government never have had sent in such a simple, unsophisticated and unremarkable bill. Ignác Darányi, representative of the governing party and later minister for agriculture, protected the bill. He remarked that the bill is not so unimportant as representative Polónyi declared. As representative Darányi explained the only reason of the rearrangement of the tasks was to gather all competencies connected to the waters in the sphere of action of one ministry. Later this reason was verified by the after-ages<sup>7</sup>. The notable minister for agriculture, industry and commerce also reacted to the remark of representative Polónyi. The minister reminded the representative of the fact, that there were remarks or amending suggestions to the spheres of action of the ministries, so there was nothing to protect. He told, that the bill reflected to a prior demand to gather the competencies connected to water in one ministry. The motive of the changes was the efficient and practical arrangement of the competencies, and renaming the ministries was only a consequence<sup>8</sup>. After this very short debate the House of Representatives adopted the bill in general<sup>9</sup>. After the third reading the bill was fully adopted on 1<sup>st</sup> May 1889<sup>10</sup>. The bill amending act III of 1848 was adopted by the House of Peers without debate after a very short time on 4<sup>th</sup> May 1889. Act XVIII of 1889 was sanctioned by the emperor and king on 12<sup>th</sup> May 1889, which also seems to be very fast. The act was pro-

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6 Budapesti Hírlap, Year IX, Issue 212, 4<sup>th</sup> August 1889, 2.

7 SZLÁVIK (1992), p. 147.

8 Protocols of the House of Representatives 1887-1892, vol. XI, 74-76.

9 Protocols of the House of Representatives 1887-1892, vol. XI, 77.

10 Protocols of the House of Representatives 1887-1892, vol. XI, 78.

mulgated on 19<sup>th</sup> May 1889<sup>11</sup>. The result of the adoption of the act is single and obvious: the names of two ministries change, and nothing more<sup>12</sup>.

During the whole parliamentary phase, the press was very moderate and acted in a low key, their reports were neutral. The amount of reports was very scarce, and the deepness of the analysis was very shallow. Only the biggest national newspapers, for example the *Pesti Hírlap*, gave detailed reports. These facts mean for me that the press was not enthusiastic because of the name-changes of two ministries.

The minister for agriculture, industry and commerce submitted a proposal for the rearranged competencies of the new ministry for agriculture and the also new ministry for commerce on 20<sup>th</sup> May 1889<sup>13</sup>. This question required the decision of the ministers' council, because the act contained nothing about it, just the establishment of the ministries was ordered. At the cabinet meeting held on 20<sup>th</sup> May 1889, the minister of agriculture, industry, and commerce presented the proposal for determining the competence of the Ministry of Agriculture and Ministry of Commerce to be founded according to Act XVIII of 1889<sup>14</sup>. It is interesting to note that the Act was announced on the previous day, 19<sup>th</sup> May 1889, but Section 4 of the Act defines the time of entering into force as follows: «The ministry shall be made responsible for the enforcement of this act. It shall also be the task of the ministry to determine the time of coming into force to be duly announced»<sup>15</sup>. The proposal of the minister covered the competences of the Ministry of Agriculture and the Ministry of Commerce, the grouping of affairs, as well as the distribution of personnel, budgetary appropriations, and funds. According to the minister of agriculture, industry, and commerce, there was only one point regarding which they were unable to reach an agreement with the minister of public works and transportation. This one point is quite a matter of detail: the right to make the final decision with respect to any notice made by private parties regarding matters of water rights and related to existing water-based structures. With the exception of this single issue, the cabinet approved the agreement reached by the two ministers and disposing over

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11 MÁRKUS (1910), p. 529.

12 KMETY (1897), p. 55.

13 MNL W12 Protocols of the Council of Ministers (K27) 1867-1944, 20<sup>th</sup> May 1889 (11. meeting).

14 MNL W12 Protocols of the Council of Ministers (K27) 1867-1944, 20<sup>th</sup> May 1889 (11. meeting).

15 Act XVIII of 1889, § 4.

competence of the Ministry of Agriculture and the Ministry of Commerce, the grouping of affairs, and the distribution of staff, budgetary appropriations, and funds. Lengthier consideration was required with regards to water rights notices, following which the cabinet was to make a decision. At the same time that the proposal had been accepted, the cabinet requested that the minister should provide notice regarding the new administration to the sovereign, the joint government, the Austrian government, and the Croatian Ban (banus)<sup>16</sup>. At the cabinet meeting held on 23<sup>rd</sup> May 1889, the agenda included the discussion of a proposal on the new competences of the Ministries of Agriculture and Commerce as well as the new division coming into effect. The minister of agriculture, industry, and commerce reported that they had reached an agreement with the minister of public works and transportation with regards to the difference in opinion related to a single matter of detail mentioned at the previous cabinet meeting. Following joint agreement between the relevant ministers, he proposed to the cabinet meeting that the new administrative system defined on 20<sup>th</sup> May should be adopted as of 15<sup>th</sup> June 1889. The cabinet accepted this<sup>17</sup>.

With the rearrangement of the spheres of action and the establishment of the separate ministry for agriculture the government created an efficient system in the agricultural management. That is the professional opinion of the after-ages<sup>18</sup>. In another professional newspaper this amendment was said to be the overture of the new era in the Hungarian agricultural history, together with calling the text of the act itself unremarkable and insignificant<sup>19</sup>. The separation of the agriculture from commerce and industry at a ministerial level was told a deep theoretical and practical change from the point of view of the agriculture<sup>20</sup>. The act is an epoch-marking change regarding the issue of waters as well, because all the tasks connected to water were united under the umbrella of the single ministry for agriculture<sup>21</sup>. From another professional perspective, from the perspective of traffic, the Act XVIII of 1889 was characterised as the dissolver of the separate and individual ministry for

16 MNL W12 Protocols of the Council of Ministers (K27) 1867-1944, 20<sup>th</sup> May 1889 (11. meeting).

17 MNL W12 Protocols of the Council of Ministers (K27) 1867-1944, 23<sup>rd</sup> May 1889 (12. meeting).

18 PERNEKI (1976), p. 346.

19 Köztelek, Years XLIII, Issue 47-48, 11<sup>th</sup> June 1933, 420.

20 Budapesti Hírlap, Year 21, Issue 254, 15<sup>th</sup> September 1901, 31.

21 *A földművelésügyi m. kir. minister 1897. évi. 25.*

traffic in an age when railway construction flourished. One reason for the cessation of the traffic ministry and the creation of the commerce ministry was said to be the fact that Gábor Baross, remarkable minister for traffic, intended to unite the tasks of traffic, sailing and railways in service of the commerce<sup>22</sup>.

The significance of Act XVIII of 1889 was valued later by the press also. Emil Nagy showed the magnitude of the act in his article in *Pesti Hírlap* a bit late, in September 1928. This article declared important principles for the Hungarian constitutional law, with which many professionals and journalists debated, especially when they later saw the practice. It is important to see that Emil Nagy was justice minister in the Bethlen-government in 1923-1924. He had a disagreement with the prime minister, and because of this disagreement he left the government and the governing party as well and joined the opposition. According to his article the most important principle of the change in the governmental structure was the following: «It is not compatible with the constitutional characteristic of the responsible government to change the constitutional rules of the executive power in a way different from an act with the only exception of an extreme necessity»<sup>23</sup>. This principle – voiced by Emil Nagy – is very strict and too permissive at the same time. He said – in the other way – in case of an extreme necessity it is possible to change the constitutional rules of the executive power in a way different from an act, without adopting an act for that. The question arises: what is the meaning of an extreme necessity? Is war an extreme necessity or already the threat of war? Is the threat of invasion or the invasion a situation of extreme necessity? Is the situation an extreme necessity in which the parliament could not be convened? The former justice minister claimed, that there was no single person in 1889 who would have thought, that changing the names and competencies of two ministries could have been done in a way other than an act. Emil Nagy declared Act XVIII of 1889 a «law-creating precedent in public law»<sup>24</sup>. We can see from the above, that the 1889 changes did not enjoy a very intense press attendance in their time. Later, when the 1889 events could be attached to something contemporaneous, they again became interesting.

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22 BERTALAN (1933), p. 255.

23 NAGY (1928), p. 2.

24 NAGY (1928), p.2.

## 2. *New ministries without portfolio in 1917*

The second example of this paper happened in 1917. The prime minister announced, that he intended to increase the number of ministries<sup>25</sup>, as reported the *Zalai Hírlap* on 19<sup>th</sup> June 1917. But this intention turned out to be not so popular. Albert Berzeviczy, that time president of the Hungarian Science Academy, wrote in his diary: «What we heard about his program, is a pile of inconsequential absurdity»<sup>26</sup>.

Móric Esterházy became prime minister among very complicated circumstances: it was the fourth year of World War I and the question of voting rights needed immediate solution to avoid the crisis in internal affairs. He led a minority government, and his main supporters were rather outside the parliament than the parties inside<sup>27</sup>. As it was the general expectation from the government to solve the question of voting rights, the press called it the ‘government of voting rights’<sup>28</sup>.

On 9<sup>th</sup> June 1917, the newspapers reported that the new prime minister, Móric Esterházy was appointed. According to the daily newspaper *Pesti Hírlap* the new prime minister was a promising person. At the same time the newspaper reported that the prime minister was not prepared for the appointment<sup>29</sup>. The opposition party newspaper, the *Népszava* highlighted that the appointment of Esterházy was a surprise for the Hungarian politics<sup>30</sup>. The newspapers reported about the planned composition of the Esterházy-government, which was not meant to be final<sup>31</sup>. There were rumours about the new ministries as well: the ministry for economy of transition, social (public welfare) ministry, ministry for traffic affairs<sup>32</sup>. The *Népszava* itself admitted that all the news about the new ministry for voting rights were nothing more than guesses. Together with the ministry for voting rights, the creation of four more ministerial positions were forecasted: ministry for public welfare, ministry for transition to peace, ministry for Transylvania and ministry for

25 *Zalai Hírlap*, Year V, Issue 130, 9<sup>th</sup> June 1917, 1.

26 GÁLI (2015), p. 203.

27 VARGA (2010), pp. 122-123.

28 For example: *Pesti Hírlap*, Year XXXIX, Issue 157, 22<sup>nd</sup> June 1917, 1 and *Népszava* Year XXV, Issue 210, 22<sup>nd</sup> August 1917, 1.

29 *Pesti Hírlap*, Year XXXIX, Issue 146, 9<sup>th</sup> June 1917, 1.

30 *Népszava*, Year XXV, Issue 145, 9<sup>th</sup> June 1917, 1.

31 *Vásárhelyi Reggeli Újság*, Year XIII, Issue 135, 15<sup>th</sup> June 1917, 2.

32 *Pesti Hírlap*, Year XXXIX, Issue 150, 14<sup>th</sup> June 1917, 5.

public labour and traffic<sup>33</sup>. The local newspaper, *Zalai Hírlap* reported the names of the possible new ministers<sup>34</sup>. After the new government came into being, according to the press rumours, the possible new ministries were: the ministry for public welfare, traffic ministry, ministry for transition from war to peace, ministry for public healthcare and ministry for the codification of voting rights<sup>35</sup>. Some newspapers reported four or five new ministries, but there were some which reported even more, six new ministries<sup>36</sup>.

Count Móric Esterházy, as prime minister introduced his program to the House of Representatives on 21<sup>st</sup> June 1917<sup>37</sup>. The king's letter on the appointment of the prime minister and the ministers was delivered on the same sitting<sup>38</sup>. At this time, no word was spoken about the new ministries.

The bill stipulating the temporary appointment of ministers without portfolio was first put on the agenda at the cabinet meeting held on 25<sup>th</sup> June 1917<sup>39</sup>. Later, this provided the government with a great degree of freedom for filling these positions, not filling them, or adding content to them. This was the first item on the agenda at the cabinet meeting, and was presented by prime minister Móric Esterházy, which reflected its significance. According to the prime minister, Act III of 1848 determined that the number of ministers in addition to the prime minister should be eight<sup>40</sup>. Act III of 1848 also determined each minister, together with their tasks and competences<sup>41</sup>. Act XXX of 1868 added the Croatian-Slavonian-Dalmatian minister without portfolio to the government stipulated in Act III of 1848<sup>42</sup>. Act XVIII of 1889 amended Section 14 of Act III of 1848 on the list of ministries. However, the position of the prime minister was that the World War and the consequent transition to peace will present tasks of significantly larger magnitude to the government, «and shall have the government of the state face incomparably more

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33 *Népszava*, Year XXV, Issue 151, 14<sup>th</sup> June 1917, 4.

34 *Zalai Hírlap*, Year V, Issue 130, 9<sup>th</sup> June 1917, 1 and *Zalai Hírlap*, Year V, Issue 131, 11<sup>th</sup> June 1917, 1.

35 *Zalai Hírlap*, Year V, Issue 134, 14<sup>th</sup> June 1917, 1.

36 *Csíki Lapok*, Year XXIX, Issue 16, 13<sup>th</sup> June 1917, 1.

37 Protocols of the House of Representatives 1910-1918, vol. XXXVI, 8-14.

38 Protocols of the House of Representatives 1910-1918, vol. XXXVI, 7-8.

39 MNL W12 Protocols of the Council of Ministers (K27) 1867-1944, 30<sup>th</sup> June 1917 (16. meeting).

40 Act III of 1848, § 10.

41 Act III of 1848, §§ 13-14.

42 Act XXX of 1868, § 44.



comprehensive tasks». According to the opinion of the prime minister, the government was able to be more successful in meeting this increased burden of tasks if it was to increase the number of government members by appointing ministers without portfolio. The bill submitted to the cabinet represented a solution to this. According to Section 1 of the bill, the number of ministers without portfolio that could be appointed was four. The bill underscored that it was only possible to appoint these ministers without portfolio for the time of war and transition to peace, emphasizing the temporary nature of the appointment of ministers without portfolio. The increased scope of governmental tasks called for the ministers without portfolio to be able to perform tasks related to the war and the transition to peace. The prime minister also believed it desirable for them to also undertake tasks outside of the scope of usual public administration competences, which represented a higher workload as a result of their special nature or high significance than for example the preparation of legislation. This is reflected in the second paragraph of Section 1 of the bill. Section 2 of the bill disposes over the temporary settlement of the extra costs related to organizing the ministerial positions, and also contains two restrictions. On one hand, the amount of extra costs related to the jobs created based on the Act cannot exceed 400,000 crowns per year. On the other hand, the bill also included a limitation as to the jobs that could be organized based on the Act. Based on this future Act, it was only possible to create and fill four positions for ministers without portfolio and two positions for state secretaries. The prime minister requested that the cabinet approve the bill to be proposed to be submitted to the king for approval, and then to the parliament together with a proposal for drafting the Act. The cabinet gave its approval<sup>43</sup>. The proposal later became Act XI of 1917.

It is easy to spot the difference between the 1889 and the 1917 events. The press was not very active in reporting about the 1889 changes despite the fact, that from the perspective of public law and constitutional traditions the 1889 events were much more important and significant. On the other side, the press was very active when reporting about the 1917 changes that had more practical than theoretical significance. The daily press was very much interested in the daily political changes, the people involved in the rearrangement of the governmental tasks.

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43 MNL W12 Protocols of the Council of Ministers (K27) 1867-1944, 25<sup>th</sup> June 1917 (16. meeting).

### 3. *Press-debate on ministries*

I would like to highlight one example, when the press exercised pressure on the government, and this pressure was – at least indirectly – successful. Do we need ministers without portfolio? Is there an urgent need for ministers without portfolio? Is there any need for ministers without portfolio? If yes, what is their reasonable number? These questions were many times asked by the opposition press and sometimes even by the press supporting the government. The reasons were different from time to time.

Act I of 1920 contained regulations on the restoration of the constitutionality and the temporary arrangement of the execution of the main state powers. This act repeated some of the regulations of the above-mentioned act XI of 1917. The 6 § of Act I of 1920 stated that the Hungarian government had to be amended, thus the position of the minister for the foreign affairs, and position of the minister for welfare and labour was added, and using the opportunity given by the Act XI of 1917, three additional positions of ministers without portfolio (minister for smallholders, minister for public sustenance, minister for nationalities) were created. The sphere of action, the tasks, the authority and the competence of these minister were to be determined by the government. The position of the minister around the person of the king was abolished. It is easy to see, that the government used Act XI of 1917 as a reference to multiply the number of ministers, the number of the members of the government. Until 1928 all the above-mentioned positions of ministers without portfolio (minister for smallholders, minister for public sustenance, minister for nationalities) were abolished. The government however decided to further use Act XI of 1917 as a reference, as an opportunity to create new ministerial positions. For example, it happened on 22<sup>nd</sup> May 1924 that János Bud was appointed a minister without portfolio for the administrative affairs connected to the finance ministry. He held this position after being a minister without portfolio for public supplies, and before being the finance minister<sup>44</sup>. He was appointed for both positions of minister without portfolio based on Act XI of 1917. Later he occupied a third position of minister without portfolio, he was appointed for minister of economy.

The daily newspaper *Pesti Napló* had a title on 16<sup>th</sup> September 1928 stating that the positions were constantly decreasing in the public sphere. There

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44 BÖLÖNY (1987), p. 278.

was only one exception: the number of ministers kept increasing<sup>45</sup>. The Bethlen-government had a political direction of very strict thriftiness. A governmental decree was issued in 1925 that determined the number of the positions in the governmental sphere. This decree had a few exceptions only, the number of ministers was such an example. Besides all the numbers of positions on the public sphere were defined and restricted, there was no such a rule for the number of the ministers. It follows that the number of ministers may have been changed at any time, it could have been increased without limits. The newspaper asks the question: What is the message of such regulation? Was it a clever idea to have such a regulation?

Hungary had 187 ministers from 1867 to 1918 for fifty-one years, but also had 145 ministers from 1918 to 1928 for ten years. These numbers are very shocking and show a very visible disproportionality. The disproportionality is much bigger if we see, that the territory of the Hungarian state decreased to one third in 1920. We can make another comparison, comparing two prime ministers: Kálmán Tisza, who was prime minister between 1875 and 1890, and István Bethlen, who was prime minister between 1921 and 1931 (his prime ministership did not end at the time of the comparison done in the newspaper in 1928). Kálmán Tisza had 25 ministers for fifteen years, István Bethlen for seven years already had 36 ministers. According to the newspaper's article, not just the number of ministers is different, but the duration of ministers in one position as well. To say it simply, the ministers were changed very rapidly. The article expressed that it was not a realistic expectation to hold a ministerial position for nineteen years like Géza Fejérváry did or for sixteen years like Ágost Trefort did. At the time of the article so stable ministerial positions were unlikely and unusual. Sándor Berecz, the author of the article emphasized that the usual and rapid changes of ministers and the high number of ministers without portfolio weighted the national budget very much<sup>46</sup>. We can see from this article, that the press' interest got the highest when daily politics, politicians and the budget also was involved.

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45 Pesti Napló, Year LXXIX, Issue 210, 28<sup>th</sup> September 1928, 13.

46 Pesti Napló, Year LXXIX, Issue 210, 16<sup>th</sup> September 1928, 13.

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Népszava, Year XXV, Issue 210, 22<sup>nd</sup> August 1917;  
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## THE INFLUENCE OF POLITICAL FACTORS ON THE ADJUDICATING ON PETTY OFFENCES IN THE PEOPLE'S REPUBLIC OF POLAND

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This publication deals with the issue of the influence of political factors on the practice of adjudicating on the petty offences in the Poland after the Second World War. My article contain not only a simple presentation of application the misdemeanour law in People's Poland, because main research problem was treated also from the historical and sociological point of view. The time of the Polish People's Republic covers the years 1944-1989 when Poland was in the sphere of Soviet influence. The Communist Party, which governed Poland in an authoritarian way, used law as a tool to protect the state and to repress people regarded to be communist system opponents. The practice of instrumental treatment of law affected also the adjudicating in petty offences cases, which model was formed basing on the Soviet example. The socialistic reform, which took place in December 1951<sup>1</sup>, implemented an adjudicating boards judging petty offences cases involving a social component. Deciding adjudicating boards were placed in the local branches of state administrative structures, thus general guidelines on the penalty policy were issued by the Minister for Internal Affairs<sup>2</sup>. Usually those guidelines have a typically repressive character, because Minister ordered the members of adjudicating boards to intensify the restrictions. Due to provision of guidelines towards the perpetrators of serious offences severe penalties were applied. Facing abolition of the judicial review of adjudication in petty offences, adjudicating boards were separated from the judicial structures. The dependence of adjudicating boards from the state administration resulted in treating adjudication on petty offences as a tool to support the realization of the state's tasks<sup>3</sup>.

During the Stalinist period (the first half of the 50s) the political character was adjudicating on petty offences regarding failure to perform compulsory

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1 Act of December 15<sup>th</sup>, 1951 on the criminal and administrative case-law (Journal of Laws No. 66, item 454).

2 ŁYSKO (2012), pp. 250-253.

3 ŁYSKO (2014), p. 212.

delivery of agriculture products. Its implementation in 1951 was designed to subject farming to the principles of planned economy by its gradual collectivisation<sup>4</sup>. Difficulties with providing supplies to cities were caused by abysmal economic policy of the communist government and they were tried to be solved by administrative and penal repression on large scale. The ideological factors resulted in pointing the repression at rich farmers. Treated as ‘enemies of the people’, they were imposed with severe fines<sup>5</sup>. The efficiency of these fines was not very high, because farmers did not want to pay. The response of communist authorities was introducing in march 1953 an arrest as a substitutive penalty, if the farmer didn’t pay the fine. This solution were in conflict with socialist idea of educational influence on the violator, which idea lied at the basis of the misdemeanour law reform from December 1951<sup>6</sup>.

Reintroducing alternative arrest in compulsory delivery of agriculture products cases gave good results, farmers started fulfilling the deliveries, but the criminal policy in those kind of cases became very repressive. Particularly severe restrictions took part in 1954 when 5647 persons out of more than 103 thousands fined due to the failure to perform obligatory supplies were imprisoned<sup>7</sup>. In practice adjudicating boards have applied severe punishments without thorough examination of each case led to multiple mistakes and suffering brought over the rural population<sup>8</sup>. Mainly smallholders and yeomen were the victims of such the attitude of adjudicating boards. Punishing elderly people, who due to bad state of health were not able to run the farm and were in severe financial plight was particularly callous. There were also cases of imprisoning the farmer’s son, though they did not deal with any agricultural activities<sup>9</sup>. In 1955, when first syndromes of post-Stalin thaw started, the system of adjudicating on petty offences became less repressive. ‘Mechanical’ punishments were replaced by educational talks to convince the charged to perform supplies voluntarily. Excessive restrictiveness of the substitutionary

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4 KALIŃSKI (1995), p. 64.

5 RAJKOWSKI (1955), pp. 81-82.

6 ADAMIAK (1976), p. 107.

7 Analiza udziału orzecznictwa karno-administracyjnego w 1955 roku w realizacji planów dostaw obowiązkowych, The Institute of National Remembrance, resource Ministry of Home Affairs I, sign. 11 + 2, p. 327.

8 ORŁOWSKI (1956), pp. 5-6.

9 Analiza orzecznictwa karno-administracyjnego za okres IV kwartału 1954 r. z terenu województwa łódzkiego, The Institute of National Remembrance, resource Ministry of Home Affairs I, sign. 526, pp. 291-292.



detention was limited and adjudicating boards were allowed to suspend imposing the penalty due to economic and life reasons. Therefore in 1955 were only 345 farmers in prisons<sup>10</sup>. Alongside with taking the government steer by Wladyslaw Gomulka in 1956 the obligatory supplies were no longer treated as a political issue. The range of the compulsory delivery was reduced and economic measures were applied to those, who didn't fulfill the duty. They were abolished in 1971<sup>11</sup>.

After political breakthrough of October 1956 the system of polish misdemeanour law became more repressive. In opinion of communist authorities the socialist idea of educational influence on the violator, which idea lied at the basis of the misdemeanour law reform from December 1951, completely failed in the practice of case-law. Due to this ides adjudicating boards were deprived of a possibility to apply custodial sanctions were often powerless facing the offenders who committed socially dangerous misdemeanours of a hooligan character or in relation to alcohol abuse<sup>12</sup>. The conditions for severe punishment of the offenders committing 'alcohol and hooligan' acts were created not sooner that in December 1958 by a thorough novelisation of the act on criminal and administrative case-law of 15<sup>th</sup> December 1951<sup>13</sup>. The changes that were introduced by the novelisation resulted in the reversal of existing proportions, as by limiting the educational element the repressive tendencies were strengthened. By reintroducing principal arrest and alternative arrest the catalogue of principal penalties became much more penal<sup>14</sup>.

From the end of fifties new political task of adjudication on petty offences was fight against Catholic church. In the times of Wladyslaw Gomulka as the first Secretary of the Polish Communist Party (1956-1970) the realations between the state and the Church were increasingly tense, because the Church tended to strengthen its influence in the society. The authorities wanted to reduce the position of the Church throught a number of administrative measures, which included refusal to allow religious meetings and gathering for

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10 Notatka informacyjna dla Kolegium Ministerstwa Spraw Wewnętrznych o przebiegu orzecznictwa karno-administracyjnego w 1955 roku, The Institute of National Remembrance, resource Home Ministry of Home Affairs II, sign. 6443, pp. 31-32.

11 ŁYSKO (2009), pp. 213-214.

12 ŁYSKO (2008), pp. 185-186.

13 Act of December 15<sup>th</sup>, 1951 on criminal and administrative case-law was amendment by Act of December 2nd, 1958 (Journal of Laws No. 77, item 396).

14 GUBIŃSKI (1990), p. 24.

religious celebrations, or collect donations for religious purposes<sup>15</sup>. Local home affairs units were supported by adjudicating boards whose main task was to repress priests and secular Catholics who had infringed the existing laws. Matters related to the activities of the Church were dealt with by specially appointed adjudicating boards and documented in separate reporting files. Specially adjudicating boards were interested in the cases of organizing meetings of religious character without required permission<sup>16</sup>. As communist authorities accepted gatherings which were connected with traditional religious celebrations, thus did not want to allow trips of faithful to pilgrimage sights<sup>17</sup>. The clergymen who organised pilgrimage movement became the main target of administrative and penal repression. However, there were also some cases of severe punishment for secular participants of pilgrimage for cooperation in organising an illegal gathering<sup>18</sup>.

Adjudicating boards also handled cases of public raising funds and gathering gifts for religious purposes without a required permission. Together with a severe fine for the organisers of the funds raising there was an additional punishment ordered, that is to say a forfeiture of the gathered funds<sup>19</sup>. An obligatory forfeiture of gathered funds from illegal public collections on religious purposes together with restrictive tax policy were to weaken the material position of the Church. However, the Church worked out such effective counterstrategies that its activity was mainly financed by the income from fund raising<sup>20</sup>. The administrative and penal repression of the sixties caused transition limitations the activity of Polish clergy and had a negative impact

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15 ŁYSKO (2007), pp. 130-131.

16 Sprawozdanie z działalności Departamentu Społeczno-Administracyjnego MSW w 1964 r., The Institute of National Remembrance, resource Ministry of Home Affairs II, sign. 6417, p. 6.

17 Notatka w sprawie zgromadzeń i zbiórek publicznych za I kwartał 1963 r., The Institute of National Remembrance, resource Ministry of Home Affairs II, sign. 7615, p. 75.

18 Informacja o przebiegu orzecznictwa karno-administracyjnego w sprawach związanych z działalnością kleru rzymsko-katolickiego w II kwartale 1963 r., The Institute of National Remembrance, resource Ministry of Home Affairs II, sign. 7615, p. 113.

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20 Informacja z przebiegu orzecznictwa karno-administracyjnego w sprawach o wykroczenia związane z działalnością kleru i aktywu przykościelnego, Archives of Modern Records in Warsaw, resource Religion's Office, sign.61/978, p. 8.

on the assets of the Church. However, ruling high fines and their absolute execution did not weaken social support of the Church, which came out of the confrontation with communist authorities victorious<sup>21</sup>.

At the end of the sixties adjudicating on petty offences was for the first time used to repress people who openly expressed objections to the policy of the communist authorities. In Warsaw adjudicating boards punished participants of students protests of March 1968, who demanded limiting censorship and widening cultural and artistic freedom. The manifesting students were treated as hooligans and their cases on infringement of public peace and order were judged on an expedited proceedings. Treating political offences as hooliganism made ground for a rapid decision and an immediate enforcement of detention or high fines substituted by detention<sup>22</sup>. The practice of punishing offences of political character that started in March 1968 was continued in the seventies and eighties, when fully collaborative adjudicating boards were used to repress the opponents of the communist authorities. Such practice was possible as the composition of adjudicating boards, which was based on persons fully collaborating with the communist authorities. Sentenced passed in the cases of petty offences committed by the opponents of the communist authorities was based on the evidence of public prosecutors. The function of a public prosecutor was held by officers of People's Militia, which was subordinated to the Minister for Home Affairs. The Ministry of Home Affairs controlled the work of bodies submitting proposals of punishment as well as of board adjudicating petty offences. This situation placed the accused of commission the petty offences acts, which have political character, at a disadvantage<sup>23</sup>.

Practise of severe punishment the political opponents favourable very repressive character the system of substantive misdemeanour law in People's Poland, created as the result of the codification works during 1960-1971. The decisive impact on the codification works had the Ministry of Internal Affairs, which perceived misdemeanour law codification as a tool to «protect public order and maintain social discipline»<sup>24</sup>. The final effect of codification

21 DUDEK, GRYZ (2006), pp. 275-276.

22 Informacja nr 1/68 z przebiegu rozpraw karno-administracyjnych przeciwko uczestnikom zejść na terenie Uniwersytetu Warszawskiego i niektórych ulic w dniu 8 marca 1968 r., The Institute of National Remembrance, resource Ministry of Home Affairs II, sign. 5297, p. 10.

23 *Kolegia ds. wykroczeń w PRL*, pp. 1-2.

24 SZUMSKI (1993), p. 131.

works was enacting the Code on Misdemeanours<sup>25</sup>, which covered not only minor infringements of public order but also offences against public peace and order sanctioned with severe penalties. The selection of penalties for specific misdemeanours relied mainly on considerations of general prevention. In consequence the custodial sentence, though exceptional in principle, was much more often used. Nearly every third misdemeanour from the specific part of the Code on Misdemeanours was punishable by principal arrest and it was nearly always in its maximum term<sup>26</sup>. In addition each perpetrator of misdemeanour could be imposed with the substantial fine, which in case of late payment were substituted by detention. In practise the collective boards judging petty offences have overused this possibility in expedite proceeding, which provided immediate enforcement of sentences imposed the fine. The common use of imprisonment as a peculiar 'reinforcement of penal measures influence' made Polish misdemeanour law one of the most repressive systems worldwide<sup>27</sup>.

The provision from the specific part of 1971 codification which penalises the most common cases of infringement of public peace and order was created to implement party authorities' guidelines which demanded to «fight negative social phenomena definitely and consistently». General stating and ambiguous attributes of a prohibited act was accompanied by an extremely wide scope of penalisation<sup>28</sup>. The provision had been introduced not only for the 'alcohol and hooligan' offenders, as it also served to repress the political opponents of communist authorities. In 1986 several petty crimes of political character, which up to then were addressed in a more favourable for the accused criminal proceeding, were transformed into the specific part the Code on Misdemeanours. In order to eliminate political opposition it was vital to transfer cases of illegal printing and distribution of informative materials, publications including critics of the system and policy of the communist authorities, to the properties of board judging petty offences. Forfeiture of assets, the punishment provided for those acts, was overused to order forfeiture of cars or video equipment<sup>29</sup>. It was the consequence of interpreting guidelines contrary to the essence of such punishment in the petty offences law. As

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25 Act of May 20<sup>th</sup>, 1971 Code on Misdemeanours (Journal of Laws No. 12, item 114).

26 MAREK (1975), p. 55.

27 SZUMSKI (1986), p. 45.

28 FALANDYSZ (1970), p. 709.

29 SZUMSKI (1993), p. 118.

the assets subjected to forfeiture were of a value more than ten times higher than the maximum fine, the forfeiture of asset came close to the punishment of confiscation of assets<sup>30</sup>.

During the whole time of People's Poland the Ministry of Internal Affairs demonstrated an ambition to make the misdemeanour law a peculiar ministerial law focused on repressing the society to enforce its subordination. On its initiative, there were some solutions that supported treating magistrate courts as an instrument realising current interests of the ministry introduced to the Code on Misdemeanours. Those solutions were used particularly during political crises. A clear contradiction between the principle of polarisation of misdemeanours and stratification of responsibility, which lied at the basis of Code on Misdemeanours of 1971, and the practice of adjudicating boards was an outcome of an administrative concept of case-law on misdemeanours<sup>31</sup>.

On the wave of events of the breakthrough year 1989, adjudicating boards ceased to deal with cases on political petty offences, which criminality was suspended due to the collapse of the communist system. The reform from 1990 submitted to judicial review the whole adjudicating on petty offences law. The institution of general guidelines on the penalty policy was abolished. Adjudicating boards were cut off from the Ministry of Home Affairs and placed in the structures of the Ministry of Justice<sup>32</sup>. Their case-law practice is no longer supporting the realisation of administrative policy of the state and takes the form of justice in petty offences cases. When adjudicating boards were transferred to the structures of the Ministry of Justice, it suddenly turned out that the Code on Misdemeanours creates the conditions to lead a rational criminal policy. Due to that, a process of defusing repressive case-law of magistrate courts started in 1990<sup>33</sup>.

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30 *Kolegia ds. wykroczeń w PRL*, pp. 17-18.

31 SZUMSKI (1995), p. 210.

32 STACHOWIAK (2004), pp. 213-214.

33 ŁYSKO (2016), pp. 316-317.

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## Chapter X

### History of Law, History and Law: Perspectives for Methodology and Teaching



HISTORY AND LEGAL HISTORY IN LATIN AMERICA.  
REFLECTIONS ON A NECESSARY DIALOGUE  
WITH SPECIAL ATTENTION TO CUBAN EXPERIENCE

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1. *Preliminar Ideas*

The relationship between Law and History is more than notorious. It is clear that both temporality and historicity are essential characteristics of legal phenomenon. Law is a historically determined entity, which emerges and develops at the rate of very specific circumstances and causalities, inherent to the social formation and the cultural context that serve as scenario. Law then becomes a product of History, and as such, it must be perceived and understood, with no intention of subtracting it from the temporal perspective that is consubstantial with it. The perfect and constant symbiosis that exists between the legal phenomenon and social complexity is one of the reasons that has led authors like Paolo Grossi, one of the most relevant legal historians of the last decades, to affirm that not only History is the driving force of Law, but it goes further and comes to be its natural habitat. In Grossi's own words:

«Law is not written in a physical landscape waiting for human interference: It is inscribed in History, large or small, which, from the primordial ages until today, men have woven constantly with their intelligence and their feelings, with their ideality and their interests, with their loves and their hatreds. It is in the heart of this History built by men, there, and only there, is where the Law is located»<sup>1</sup>.

History as an academic discipline has also contributed to the apparition and construction of those fields of knowledge that nowadays we call social sciences, including obviously legal science. Those are some of the reasons why the importance of Legal History and the necessary dialogue between History and Legal History must be sustained. However, the delicate situation that the historical-legal matters are going through today, both in the scientific and editorial panorama and in the scope of legal education, is incongruent with the valuable wealth that they can enclose *per se*. The disparagement they have

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1 GROSSI (2006), p. 22.

been suffering becomes a reality that is palpable in many parts of the world. This situation is manifesting in an alarming way in Europe, where traditionally the strongest spaces of this type of subjects have been located, but there is no doubt that in Latin America it has been more pronounced, mostly due the socioeconomic conditions of the continent's countries, which are not very favorable either, affecting this issue with incalculable effects.

This currently represents a serious problem on which more than one reflection would have to be made. Although it is true that in the course of time historical-legal disciplines have had their unevenness, although the place they have occupied within the curricula of universities have suffered many oscillations, the current context seems more disturbing and without possible solutions in the short and medium terms. Our objective will be to analyze the relationship between History and Legal History during the last decades in the Latin American scientific framework. Cuba will be taken as the main point of reference, because in the Island, despite the absence of the required dialogue between both mentioned disciplines, they have followed very similar paths all along the different stages of Cuban science's evolution

## *2. Epistemological Delimitation of Legal History*

Many authors have tried to define the epistemological status of Legal History of Law, which has not been an easy task. In this sense, there has been more than one position. One of the most accepted is the one that encompasses Legal History within the science of History's disciplinary boundaries. This tendency finds its origin in the reflections of the French historian Marc Bloch, who affirmed as follows<sup>2</sup>:

«For example, we have the "history of law." The text books (...) have popularized the term. But what does it mean? A legal rule is a social norm, explicitly imperative, sanctioned by an authority capable of imposing respect by an exact system of compulsions and penalties. In practice, such precepts can govern the most diversified activities. They are never the sole mean of controlling them: in our daily conduct, we are constantly complying with moral, professional, or fashionable codes which often make different demands from those of the codes of the law. (...). Hence, law, in the strict sense of the word, is only the formal covering of realities which are in themselves too diversified to furnish profitable subject-matter for a single study. Moreover, it exhausts none of these realities».

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2 BLOCH (1992), pp. 122-123.

Marc Bloch perceived History not as a science of the past but a science of the human actions across the time. Therefore, juridical facts distinguished themselves from others to the extent that their elaboration and application emerged from «the particular work of a group of relatively specialized men» that developed a common human activity. In essence, «the history of law has no separate existence except as the history of jurists»<sup>3</sup>. Bloch's asseveration would lead Legal History to be considered as a historical science, which, despite not receiving sufficient doctrinal treatment, would be embraced by some of *Annales* School's members, such as Fernand Braudel. According to Braudel, the History of civilizations and the History of cultures could not be understood in an isolated way but as «an orchestra of particular histories» where Legal History constituted one of the many pieces, in combination with History of language, History of literature, History of sciences, History of religions, History of institutions and others<sup>4</sup>.

In the area of legal historians, there were also cases like the Spanish professor Francisco Tomás y Valiente, who defended the idea of understanding Legal History as a branch of History; therefore, it should extract its principles methods and concepts from there<sup>5</sup>. In contrast to this criterion, researchers like Alfonso García Gallo (also Spanish) would raise their voices to uphold firmly the need to classify the Legal History as a legal science, because only this way its full development could be achieved, and the historical perspective was only one of the many methods to face the study of Law<sup>6</sup>. Between these two positions, authors like José Antonio Escudero would assume a more conciliatory attitude, conferring Legal History a dual character. That means to contemplate it as historical science and legal science too, since historicity should be recognized as a Law's attribute, but at the same time, the legal element would persist to the point of subordinating any legal-historical approach to the perception of legal phenomenon in each historical moment<sup>7</sup>.

In Latin America, Legal History's epistemological delimitation has not been ignored altogether, but neither has it occupied a central point in the methodological and conceptual debate around it. In recent times, some academics from the continent have addressed the subject. Among these ones

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3 BLOCH (1992), p. 123.

4 BRAUDEL (1970), pp. 131-132.

5 TOMÁS Y VALIENTE (1976), p. 7.

6 GARCÍA GALLO (1953), p. 28.

7 ESCUDERO (1995), pp. 40-41.

there are the cases of the Colombian Andrés Botero Bernal<sup>8</sup>, the Peruvian Carlos Ramos Núñez<sup>9</sup> and the Chilean Eric Palma<sup>10</sup>. However, Latin-American legal historians have rarely been attracted to the contributions of the different historiographic schools during last decades or the discussions and debates emerged among these ones. In the region, there have been several examples of prominent jurists who have dosed their scientific production between Legal History and History. In this sense, names like those of the Argentine Ricardo Levene<sup>11</sup>, the Peruvian Jorge Basadre<sup>12</sup> and the Cuban Ramón Infiesta<sup>13</sup> stand out, just to mention a few. Nevertheless, these authors were associated with the positivist historiographic and during last decades, science of History has witnessed great advances, without Latin American legal historians feeling debtors of them.

In fact, predominance of a normative method has marked the development of Legal History in Latin America. Another significant problem has been the rigid positions in regard with the epistemological status of the Legal Science. Among jurists is common to delineate boundaries of legal studies within those strictly legal elements, ignoring Law's multidimensional condition. Unfortunately, legal historians have also assumed these criteria, and as a result, Latin American Legal History has shown an extremely restricted vision of legal phenomenon, adjusted to the evolution of legal norms and institutions. To this must be added that one of the characteristics of Latin American historiography of the XIX and XX centuries is the influence of certain social and cultural factors, as well as marked class interests. Since the consecution of independence, the oligarch establishment, which appropriated political power in the young republics, took care of using History as a mechanism of political and social control that had as function the distortion of the collective memory.

### 3. Cuban Legal Historiography

In the specific case of Cuban historiography, at the beginning of the 20<sup>th</sup> century, a historiographical stream known as *campaign literature* became

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8 BOTERO BERNAL (2010).

9 RAMOS NÚÑEZ (2013), pp. 41-83.

10 PALMA GONZÁLES (2002), p. 51.

11 SEE LEVENE (1924), LEVENE (1930) and LEVENE (1962).

12 SEE BASADRE (1937), BASADRE (1999) and BASADRE (2005).

13 SEE INFIESTA (1939), INFIESTA (1937) and INFIESTA (1942).

very relevant and acquired very peculiar nuances. We are talking about a testimonial and pre-scientific historiography that was not the result of a prodigious intellectual labor, nor did it show off exquisite erudition. Its exponents in their whole were veterans of the Independence War, who provided a limited and consciously altered version of the emancipation process and emphasized the atrocities of the colonial regime that had recently been left behind.

Since the decades of the twenties and thirties, a generation of historians, alien to the war veterans, would come to the fore, led by figures such as Ramiro Guerra<sup>14</sup>, Herminio Portell Vilá<sup>15</sup> and Emilio Roig de Leuchsenring<sup>16</sup>. These would begin to write a positivist History, which led to a vocation for the use of archives, for the selectivity of materials, for the critical analysis of sources and for the subordination to the principles of neutrality and objectivity. Paradoxically, between the two described orientations, certain points of convergence were palpable, because they shared identical purposes: to embody the principal builder of memory, as well as to contribute to the forging of national consciousness. As consequence, both schemes strove to exalt the epic attributes of the liberating process, magnifying it at all costs.

This is the reason why the emancipatory deed was revealed as the immaculate crucible of the most altruistic ideals and it was intended to surround with a halite of excessive heroism. The protagonists of this History (or rather its only characters) were none but the Republic's founding fathers, the undefeated generals who led the epic battles that guided to independence and that casually formed the ruling class during the first republican decades. Subsequently, the role of the slaves was relegated. The suffering of the black people who died wielding the machete, or who survived the war and after it ended, were marginalized by a racist society that would subject them to the cruelest humiliations, was minimized. Thereby, the voices of the indigenous, led practically to extermination, were totally silenced. The misery of the exploited peasants and the evicted families simply erased. There was evidence of a historiography undermined by classist interests and rancid elitist flavor, which, concentrated in the noble figures and major events, did not consider the rest of the social sectors that had contributed to the forging of the Nation's History.

Legal historiography was obviously inserted in this trend. Such is the case of the Constitutional History taught at Havana University by teachers Ramón

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14 GUERRA (1950).

15 PORTELL VILÁ (1941).

16 ROIG DE LEUCHSENRING (1958).

Infiesta, already mentioned, and Enrique Hernández Corujo. Both teachers developed a discipline quite attached to Political History, in which History was granted an eminently passive role, whose sole purpose was none other than to serve as a precedent to the current positive Law, that is, the one that is endowed with normative efficacy. We must notice how Ramón Infiesta pondered the political fact as a conditioning factor of the constitutional phenomenon, since the Constitution was nothing more than the 'formal interpretation' of this political fact<sup>17</sup>. Thus, any type of incidence of the social and economic sectors in the constitutional experience was excluded and, consequently, the approaches of both professors took as their guiding thread the constitutional norm, encumbering it as an expression of the political will represented in the State power, without prejudice to dwell on the ideological currents in them crystallized.

For that motive, we realize that the Constitutional Law was limited to that one dictated from above, from power, embodied in legal norms, linked to major political events and not to economic transformations or to struggles and social demands. An important aspect is that both Infiesta and Hernández Corujo conceded a great relevance to the independence process. In fact, not only they provide a considerable space to the constitutional texts promulgated in the middle of the battlefield in attempt to establish a Republic in times of war, but also, regardless of its limited territorial scope and its relative and intermittent effectiveness, these documents were more than simple historical curiosities. According to these authors, these constitutional texts, which ruled only at the territories momentarily occupied by the liberating army, represented, although in embryonic phase, the first configuration in practice of a Cuban State with its own identity and purposes<sup>18</sup>.

With the socialist revolution of 1959, although the contexts were very different, there was a phenomenon very similar to the one narrated before, but in a more radical way. The revolutionary triumph implied a series of deep transformations not only in the political sphere, but also in the social and economic area. It was necessary to alter the directions of the dominant cultural and intellectual tendencies within the country in order to build a society nourished by very different values, a society that would work under other schemes and principles opposed to those inherent to the model that was intended to be left behind.

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<sup>17</sup> INFIESTA (1942), p. 8.

<sup>18</sup> HERNÁNDEZ CORUJO (1960), pp. 227-229.



This situation had a serious impact on History and Legal History, which translated into an attempt to break all ties with the past. That is the reason why revolutionary historiography tried to eradicate all residue that reminded of the previous political and social model, refusing to show the preceding republican experience as a genuine cultural space which, notwithstanding its obvious flaws and abuses, played a decisive role in the consolidation of the Cuban legal tradition. This process ignored various pieces of an era that overall harbored the names of distinguished jurists who came to form one of the most enlightened guilds in Latin American continent. In that way, we run the risk of becoming a country without a legal memory, a country whose only references to its legal past would be the distorted images projected by a dogmatic historiography. The worst of all is that with the loss of collective memory what really is in danger is a Nation's identity itself.

Within the methodological scope, Legal History would intend to embrace the Marxist analytical categories and would follow the schemes patented by socialist countries from Eastern Europe. That is how Legal History would turn into a History of State and Law. However, the addition of the element 'state' was quite superfluous, just like Witold Kula stressed. In one hand, the State phenomenon was complex enough to be comprehended in a general sense, so it was very possible to redound to a Political History. In the other hand, Legal History had necessarily to put equal value on Private and Public Law<sup>19</sup>. Despite of the attempt to implement a dialectical-materialist approach, a Legal History focused on norms and institutions kept being produced; An uncritical Legal History which plays the role of legitimating discourse for the established order<sup>20</sup>. The paradox described by Manuel Moreno Fraginals in his controversial essay titled *History as a weapon* was more than evident. Instead of renovating the historical research by rethinking sources and methods, the obsolete conceptions remained more alive than ever. A new society demanded a new History<sup>21</sup>.

#### 4. *Final Reflections*

Some years ago the Spanish professor Carlos Petit asserted that legal historian's current task resided in the cultivation and development of what he classified as the jurist's memory, which he associated with the «disciplinary

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19 KULA (1977), p. 63.

20 See HESPANHA (2005), p. 22.

21 MORENO FRAGINALS (1999), p. 11.

tradition of Law and of those who socially were identified as their experts», as well as with the line of «the genealogy of legal knowledge»<sup>22</sup>. We agree that legal historian's mission is related to memory, although in addition to its cultivation and its development, is urgent to look forward its rescue and its reconstruction. For that purpose, today more than ever it becomes necessary to promote the interdisciplinary and the multidisciplinary dialogue. It is required to accept the contributions that can give us other branches of Law, as well as the rest of the social sciences, not only History but others as Sociology and Anthropology, just to name a few.

It is indispensable to reformulate the historical sources used by us so far. Within these sources, the written norm has enjoyed an almost undisputed supremacy. It is clear that the written norm cannot be suddenly discarded from historical-legal analysis, since today it is probably the most obvious manifestation of Law and it could even be said that it is the most important. Written norm is undoubtedly a direct source of History, but we also must consider other indirect sources that are living testimony of other times and should be exploited as such. We speak for example of literature and cinema, whose use has experienced some reticence by most of Latin-American legal historians, with few exceptions like Mexican researcher José Ramón Narváez<sup>23</sup>, and the already mentioned Andrés Botero Bernal<sup>24</sup> and Carlos Ramos Núñez<sup>25</sup>. It is a matter of conceiving Law rather than as a norm as an experience.

All that has been exposed means that rather than focusing on its formal aspects, we must pay attention to the ways in which it has been lived and conceived in each historical moment. That will force us to take into account all those elements that in one way or another have influenced its creation and evolution, even those that are not strictly legal. Therefore, we have to delve into Law's popular dimension, into the perception it has had in each of the different levels of society. It is not about neglecting other classic sources such as the written document either, it is about taking a constantly critical position regarding it, assuming it is not a reservoir of an absolute truth. It would also be very useful to resort to a range of documents that have been forgotten such as notarial protocols and judicial archives, which protect a whole world of precious information.

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22 PETIT (2007), p. 331.

23 NARVÁEZ HERNÁNDEZ (2009), pp. 75-91; NARVÁEZ HERNÁNDEZ (2012).

24 BOTERO BERNAL (2009).

25 RAMOS NÚÑEZ (2007).

If we observe all these reflections from a pragmatic perspective, these aspects could be understood as guidelines to enrich our discipline, expanding our craft's horizons. This is valid, but what we are really called is to fulfill the social function legal historians carry on our shoulders. We are meant to unmask the mythologies that modernity has wanted to impose, those Paolo Grossi refers to<sup>26</sup>. We are obligated to cast off all forced analogies, all anachronisms and false continuities, which we have got accustomed to already.

Our analysis has focused on examples characteristics of Cuban legal historiography. We are conscious that Cuba has its historical peculiarities that distinguish it at many levels from the rest of Latin America, but the legal historiography of the continent shares the same problems in many ways. Perhaps many of the topics we have addressed may seem obvious in other scenario, but the truth is that in Latin American continent the situation described has not been exceeded at all. Legal History that is still taught in our universities at this point is the positivist, or better said, normative Legal History. A political and official Legal History narrated from State power. We believe it is now our turn to claim for the social, cultural, economic legal History, a Legal History that does not forget to include the indigenous, the slave, and the peasant.

We must go deeper into our traditions, and this means we must examine closely our realities instead of looking for concepts and notions alien to us. It is time to foment a holistic vision of Legal History, aware of the foreign trends that can serve us as a reference, but always subordinate to our national and regional needs, problems and qualities. It is a matter of assimilating only what can be or need to be assimilated. Latin America has its own History. Its legal culture is exuberant, and its roots are solid and profound. We insist that the rescue and reconstruction of our legal memory not only obey the clamor to continue swelling our vast cultural heritage but embodies the most sacred commitment we can have with future generations, and the greatest treasure that we can bequeath to them. We believe legal historians can contribute much to this cause, so borrowing the idea outlined by Manuel Moreno Fraginals decades ago, we need to vindicate History as a weapon, a powerful weapon, which means not an instrument or control device, but emancipation.

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26 GROSSI (2003).

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TEACHING A HISTORICAL CONTEXT IN A FIRST-YEAR  
'INTRODUCTION TO PRIVATE LAW' COURSE.  
THE EFFECTS OF TEACHING APPROACHES AND A LEARNING  
ENVIRONMENT ON STUDENTS' LEARNING

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1. *Introduction*

Humanities, academic disciplines such as literature, philosophy and history, have their own methodologies, methodologies different than those of the legal discipline. This contribution deals with one course at Utrecht University, a course not only consisting of contemporary private law, but also of legal history. With regard to the legal history part a different methodology, not common to jurists, is chosen, namely historical thinking or historical reasoning (borrowed from history, and thus humanities). In order to teach legal history, primary and secondary sources are used, the main aim being to ask students to compare these sources with legal situations during other periods of time, to describe change and continuity, and to make historical connections by contextualizing (legal) historical developments in a broader legal and historical development. Therefore not only methodology of (teaching) law but also methodology of teaching humanities is used.

A complicating factor is that within legal education there has always been tension between an academic pursuit and obtaining a professional qualification<sup>1</sup>. In the Netherlands law students tend to focus on what they believe will be their legal practice and on what is needed for their professional qualification of choice. They perceive meta-juridical aspects as being less relevant and this perception does not help in getting students to intrinsically delve deeply into meta-juridical matters. The same attitude by students can be observed in courses like 'Law and Humanities', other 'Law and ...' courses, and also in courses like legal theory and legal history. Law students have already been shown to have a preference for surface and passive learning. If, therefore, law programmes at universities do not take care, and make sure that some minimal curriculum and course design requirements are fulfilled, students

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1 CARASIK (2011), p. 738 ss.

will tend to approach the academic courses with an multidimensional and/or with meta-juridical aspects with a surface approach in which their main goal is to pass the examination<sup>2</sup>. In a surface approach to learning the students' intention is to get the task out of the way with minimum effort to meet the course requirements, *i.e.* by routinely only memorising facts and procedures (rote learning). The opposite approach is the deep approach to learning, meaning that a student is actively engaged in the search for underlying meanings, *i.e.* by relating ideas to previous knowledge and experience<sup>3</sup>. Deep learning is a way of learning aimed at understanding the meaning behind (legal) texts, critically examining new facts and ideas, and tying them into existing cognitive structures and discovering links between ideas. A deep learning approach is of key importance for the engagement of students with their subject material, and results in an improved quality of learning outcomes<sup>4</sup>. This finding not only applies to positive law, but *a fortiori* to meta-juridical aspects, aspects which often are new to students and require other ways of learning and studying than those required for reading legislation, for case law analysis and for studying legal doctrine. The first question that arises is what approach do Dutch first-year law students in general have. Furthermore, if students indeed have a preference for surface learning, the next question that arises is how a surface approach can be turned into a deep approach to learning and, in that respect, what influence does teaching have at the level of student learning, especially in courses which include contextual aspects.

Students' approaches and their study activities are the outcome of interaction between students and their environment, including the role of the teachers. According to (the quantitative study by) Trigwell *et al.*, there are two ways of teaching: one that focuses on transmitting knowledge and one that focuses on students and on achieving a change in their conceptions. The first way of teaching more likely leads to a surface approach, the second way of teaching

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2 See also GLOFCHESKI (2016), p. 134 nt. 17, who refers to a survey of law students conducted at the University of Hong Kong in 2006 revealing a preference for passive and surface learning in lectures and tutorials over activity-based learning, because they more closely reflected the assessment process (normally a heavily weighted final examination). See also again GLOFCHESKI (2016), p. 141, stating that if listening and reading are the primary learning activities, and are what students are assessed on, the learning gain is not likely to be substantial; listening and reading are very likely to encourage short-term reproductive learning habits.

3 See BIGGS, TANG (2011), esp. p. 24 ss. and already elaborately BIGGS (1987).

4 See *e.g.*, POSTAREFF, PARPALA, LINDBLOM-YLÄNNE (2015), p. 316 with references.



to a deep approach<sup>5</sup>. The approach that students adopt is not a personality trait, but is also related to their perception of the task to be accomplished<sup>6</sup>. Therefore teachers' conceptions of teaching and their beliefs as to the purpose of legal education will have consequences for their teaching approach and on the perceptions students have of their tasks<sup>7</sup>. Furthermore, different course designs will also potentially influence students' learning approaches<sup>8</sup>. A small number of students at the Law Department of Utrecht University (until 2016/2017 150 per year; since 2017/2018 100 per year) follow a special programme at the Utrecht Law College<sup>9</sup>: these honours students are highly motivated, excellent students who want to invest more time in (extra-)curricular activities than the normal programme requires. In this study we will also investigate whether these students have a different learning style and/or whether their learning style is affected more or less due to the course design and the teaching approaches.

This study uses a quantitative approach to investigate the surface vs. deep learning of law students in the first-year 'Introduction to Private Law' course. The purpose of this study is to measure the effect of (a new) course design and teaching approaches on the learning approaches and learning outcomes of first-year law students<sup>10</sup>. Firstly, the next section describes the background of the present teaching system and the curriculum (par. 2), followed by a discussion of the course (re)design of 'Introduction to Private Law' (par. 3). Then, the research methods used to measure learning effects are discussed (par. 4). The results are then presented, *i.e.* the collected data are those measured amongst first-year law students at Utrecht University in the academic year 2016/2017 (par. 5)<sup>11</sup>, followed by some observations and discussions based on findings in the broader context of educational literature (par. 6). In this final discussion and conclusion some recommendations will be provided as

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5 TRIGWELL, PROSSER, WATERHOUSE (1999).

6 See already MARTON, SÁLJO (1976).

7 CHESTERMAN (2016), p. 77.

8 CHEN, HU (2013), p. 97 ss.

9 Since September 2005 Utrecht University has offered the Utrecht Law College (ULC) programme, a specific honours programme of the Law Department, which is specifically intended for students of excellent quality.

10 In conducting this study the approach of Bishop-Clark and Dietz-Uhler (*Engaging in the Scholarship of Teaching and Learning*) has been followed.

11 The 'pre-course' measurement is also interesting, as will be discussed in par. 5, to show differences between the learning approaches of students at the start of their course.

to where to find (further) possibilities to stimulate students towards a deep approach to their learning.

## *2. Description of the teaching system and the curriculum*

In the bachelor's phase at Utrecht University, student-activating teaching methods, as far as possible in small groups, is the commonly used teaching model. Although academic training within a discipline as well as specialized academic training for legal practice/the profession are the teaching objectives at Utrecht University, in the bachelor's phase academic training is emphasized<sup>12</sup>. Teaching at the Department of Law takes place in large (500, 300 or 150 students) as well as in smaller groups (*approx.* 25 students). Teaching in larger groups mainly consists of lectures delivered by a senior staff member and is aimed at transferring knowledge, although interactive elements are increasingly incorporated into the lectures. In smaller groups the input of students is crucial. Courses are designed in such a way that active participation in these smaller groups (*ca.* 25 students), called working groups and/or workshops, is encouraged. In the first years of the bachelor's degree in law, large groups of students are divided into these smaller groups. These smaller groups are taught by various teachers. Although the content of the lessons taught by various teachers to working groups is the same, every teacher has his/her own teaching style and focus. Honours students remain part of the same small groups for at least two years, while other groups change more frequently in their composition.

At the Department of Law at Utrecht University students are trained to acquire profound knowledge and understanding of the law and the legal system, in line with the requirements of professional practice, but also learn to pay attention to (developments in) society. Students are educated in such a way as to be able to build tomorrow's law. Together with preparation for being responsible jurists in society, students should acquire the ability to problematize the law in the light of legal and non-legal insights. This is in line with the view of Chesterman, who stated that modern legal education should provide graduates with doctrine, perspectives and skills<sup>13</sup>. By perspectives he meant an appreciation of the contexts in which the law operates: historical, theoret-

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12 See the *Guidelines on Teaching of Utrecht University*, dated 1<sup>st</sup> July 2014.

13 CHESTERMAN (2016), p. 79.

ical, cross-cultural, cross-disciplinary, or global<sup>14</sup>. At the Department of Law of Utrecht University these elements are an integral part of the curriculum. In the development of contexts and methods in the educational programme the focus lies on the multidimensional perspective of law. This approach implies a consideration of positive law in a scientific as well as in a social context. With regard to the scientific context, students have to look across the boundaries of the law, *inter alia* by means of meta-juridical perspectives, one of which is legal history. Previously, in various other universities in the Netherlands and abroad, the study of context was offered in separate context courses over the years, in courses such as legal philosophy, legal history<sup>15</sup>, the sociology of law etc. With the latest revision of the bachelor's curriculum in Utrecht (2015), these courses are no longer obligatory (and sometimes they have even disappeared), but context has become an integrated element in regular law courses focusing on the content of positive law<sup>16</sup>.

### 3. *The (re)design of the 'Introduction to Private Law' course*

One of the courses offered in the bachelor's degree in law at Utrecht University is the first-year course 'Introduction to Private Law: Law of Obligations' in which over 700 students were enrolled in the year 2016/2017, divided into 27 working groups (six of which were composed of honours students at the Utrecht Law College) taught by 11 teachers. This course is compulsory for all law students. Together with some legal skills, legal history is integrated with positive Dutch law in this course. The remaining part of this article focusses on the legal history part of the 'Introduction to Private Law' course.

Law students are well trained – in their secondary education, but also at university – in memorising facts and data, and so they are able to acquire and reproduce information on various historical figures, events, developments and themes in the area of law. But are they also able to use this knowledge, to critically think and reason about past and current legal issues? It is this process of using knowledge of the past in order to make sense of particular contemporary situations that is called historical thinking or historical reason-

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<sup>14</sup> *Ibidem*.

<sup>15</sup> For an interesting account of teaching legal history in US law schools, see JARVIS (2014) and VAN DONGEN (2015).

<sup>16</sup> Project Group Context and Methods, *Revision of the Bachelor Curriculum in Law 2015*, dated on 18<sup>th</sup> April 2014.

ing<sup>17</sup>. In the course the importance of historical thinking skills while learning historical content is emphasised<sup>18</sup>. In order to teach legal history, primary and secondary sources are used, the main aim being to ask students to compare these sources with legal situations during other periods of time, to describe change and continuity, and to make historical connections by contextualising (legal) historical developments in a broader legal and historical development. The students must learn to draw conclusions as to the significance of certain legal issues, changes and/or developments.

In traditional legal history courses, the emphasis often lies on the repetition of facts, years and events. If the course is designed for that purpose, a surface approach to learning is to be expected. To stimulate a deep learning approach in 'Introduction to Private Law' students first attend a lecture and a tutorial on contemporary law and later in the same week they attend a newly designed tutorial. In these tutorials students have to relate new ideas on context and legal history to previous knowledge and experience on the same topics already studied, thereby encouraging historical reasoning and deep learning.

The integrated approach to skills (reading cases), content (private law) and (historical) context during workshops usually starts with a legal judgment of the Dutch Supreme Court<sup>19</sup> of which students have to explain the facts and judgments of the judges in various instances (skills: reading case law). Based on the Advisory opinion of the Procurator/Advocate General, the judgement of the Dutch Supreme Court and secondary literature, students have to reconstruct the historical development of the legal issues at stake, from Roman law and/or Old Dutch law onwards until contemporary law. Students work according to a loose variant of the Think-Pair-Share method<sup>20</sup>. According to this method students first take some time to think about an assignment themselves, then discuss matters with one or two other students, and in the final stage discuss their solutions with the whole group. Students reflect on different legal outcomes/solutions and dogmatic constructions, contemplating the interaction between legal sources, the reception of legal sources, the

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17 VAN BOXTEL, VAN DRIE (2013), p. 44.

18 Various historical thinking skills can be distinguished: analysing historical sources and evidence, making historical connections, chronological reasoning and creating and supporting historical arguments. See College Board, *AP Historical Thinking Skills*, 2015, online, pp. 10-11.

19 In one case starting from an old newspaper article.

20 See LYMAN (1981).

contextualization in time and the economic background. Furthermore, they analyse the interpretation of the argumentations of the Supreme Court, the interpretation methods used by judges in which the legal history method is discernible, whether doctrines are followed in later and/or higher decisions and/or whether they deviate from the earlier decisions. This outline and content of the course is expected to encourage a deep learning approach by the students.

#### 4. Method

In order to measure students' approaches to learning, an adapted version<sup>21</sup> of the revised two-factor study process questionnaire (R-SPQ-2F)<sup>22</sup> was used. For the outcome of this learning process, students' scores in their final examination were used. In the examination one question was added in which deep approach learning to legal history was particularly relevant. To measure the teaching approaches to learning the *Approaches to Teaching Inventory* (ATI)<sup>23</sup> was used. This Dutch/Belgian version of the validated questionnaire was modified, after comparing it to the English original, to suit the specific context of the first-year law course. Some additional questions were added which focused on the particular content and the method of working during the course. Finally, a final version of the questionnaire was validated.

At the start and at the end of the course students filled in the survey questionnaires (in Dutch), reflecting their study approach as influenced by previous educational experiences (the first two courses at the university) – the 'pre-course' scores – and their study approach at the end of the course – the 'post-course' scores. Questions were answered on a five-point Likert rating

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21 Having compared the Dutch questionnaires with the English-language original questionnaires, the statements were adapted to the actual context of the Introduction to Private Law course, and supplemented with some questions specifically related to the course.

22 BIGGS, KEMBER, LEUNG (2001), p. 133 ss.

23 We have used the English version found online at the University of Birmingham. The Expertise Centre of Higher Education at the University of Antwerp, in particular Dr. A. Stes, was so kind to send us the online version of the *Approaches to Teaching Inventory*, and the Dutch version of the R-SPQ-2F, as well as relevant published articles. We used the following publications: STES, DE MAEYER, VAN PETEGEM (2008) and STES, DE MAEYER, VAN PETEGEM (2013).

scale.<sup>24</sup> Some examples of statements in the student questionnaire are: «I find that at times studying gives me a feeling of deep personal satisfaction, I test myself on topics until I understand them completely, I find I can get by in most assessments by memorizing key sections rather than trying to understand them, I believe that lecturers should not expect students to spend significant amounts of time studying material everyone knows will not be examined»<sup>25</sup>. Students were asked to write down their student identity number on both surveys. Based on this number, responses to both surveys could be matched, also to the teacher approach and the exam scores, for subsequent analyses. Data were analysed anonymously and not correlated to specific students in order to guarantee the privacy and anonymity of the students. As not all students were present in class at both moments and/or did not participate in the final exam, not all the results could (fully) be used. Different groups were differentiated in the statistical analysis: present at both moments and participation (yes/no) in the exam (1), only present at the first moment and participation in the exam (yes/no) (2), only present at the second moment and participation in the exam (yes/no) (3), and absent during both moments but participation in the exam (4). Depending on the specific kind of statistical analysis one or more of those groups were used. At the end of the course, teachers completed the ATI. The two scales in this questionnaire are ‘information transmission, teacher-focused’ and ‘conceptual change, student-focused’<sup>26</sup> (see more elaborately on these scales in par. 5.3). Some examples of statements in the teacher questionnaire are: «In this subject students should focus their study on what I provide them. I structure my teaching in this subject to help students to pass the formal assessment items. Teaching in this subject should help students question their own understanding of the subject matter». In order to study whether the teaching approaches have influenced the development of students’ learning, the results of the student surveys and exam results were compared and related to the approaches taken by the teachers. The results of the questionnaires and the exams were brought together, supplemented,

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24 Respondents had to express their approaches to learning on a 5-point Likert-type scale ranging from (the Dutch equivalents of) «never or only rarely true of me» (1) to «always or almost always true of me» (5).

25 Taken from BIGGS, KEMBER, LEUNG (2001).

26 TRIGWELL, PROSSER (1996), p. 80. Both two scales of R-SPQ-2F and ATI have two sub-scales (intention – why someone adopts a particular strategy – and strategy). Considering the size and focus of this contribution, this difference will not be dealt with elaborately.

edited and transferred to Excel files. For further study the *Statistical Package for the Social Sciences* (SPSS) was used. Statistical methods were used to interpret the data in SPSS and to provide answers to the research questions.

## 5. Results

### 5.1. Validation and general results

In the pre-course survey there were 532 responses and in the post-course survey 504 in total. A total of 653 students (of the 748 enrolled) participated in the final exam. The scale reliability, in other words the homogeneity of the items of the questionnaires, was calculated by means of Cronbach's Alpha ( $\alpha$ ). Cronbach's  $\alpha$  is a measure of internal consistency, *i.e.*, how closely related a set of items are as a group. The Cronbach's  $\alpha$  for the 10-item part on the deep approach of the Revised version of the Study Process Questionnaire was .749<sup>27</sup>. The Cronbach's  $\alpha$  for the 10-item part on the surface approach of the same questionnaire was .758<sup>28</sup>. The Cronbach's  $\alpha$  for the 22 items of the Approaches to Teaching Inventory was .79. These Cronbach's  $\alpha$  values indicate that both questionnaires are reliable and are valid to use in this context.

With regard to the educational design, on average students thought – compared with the two previous courses in the first year of the Law curriculum – that it helped slightly better in gaining insight into the working of law in context (mean = 0.161, SD = 1.162,  $n$  = 333). With regard to the motivation to study contextual approaches to law, students on average were less positive (mean = -0.430, SD = 1.135,  $n$  = 335). With regard to the ability to reflect upon contemporary matters by using insights regained from non-legal disciplines, students on average thought that it slightly decreased (mean = -0.355, SD = 1.145,  $n$  = 332).

### 5.2. Changes in student' learning approaches during the course

The first question was what the learning approaches of first-year law students at the beginning and at the end of the *Introduction of Private Law* course were. A distinction has been made between honours (1) and non-honours students (0). In figure 1 two variables, namely the deep and surface ap-

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<sup>27</sup> The scale is from 0 to 1, from totally not to perfectly homogeneous.

<sup>28</sup> These measurements were taken from the pre-course surveys. The Cronbach's  $\alpha$  of the post-course surveys were .800 (deep approach) and .713 (surface approach).

proach of students according to the pre- respectively post-course surveys, are visualised. It shows that in general the students showed, on average, a higher deep approach than a surface approach at all moments. The honours students scored higher on a deep approach to learning and lower on a surface approach, when compared to the regular students. After the course (when comparing the post-course situation with the pre-course situation ( $n=358$ )), by using a one-sample paired  $t$ -test, the approaches changed slightly, with a significant decrease in the deep approach (0.34, SEM: 0,028) while surface approaches remain more or less the same over the course (the difference is only marginally significant, 0.04; a change of 0.05 with SEM: 0,027).

The results of a one sample paired  $t$ -test show that the deep approach of honours students decreased more than that of regular students (-0.43 resp. -0.31), and the surface approach increased slightly more (-0.08 resp. -0.04). The results show that, when looking at the general picture when comparing the pre- with the post-course scores, if the surface approach increases, the deep approach decreases, and if the deep approach increases, the surface approach mostly decreases. In this development, there is not really any difference between honours and regular students.

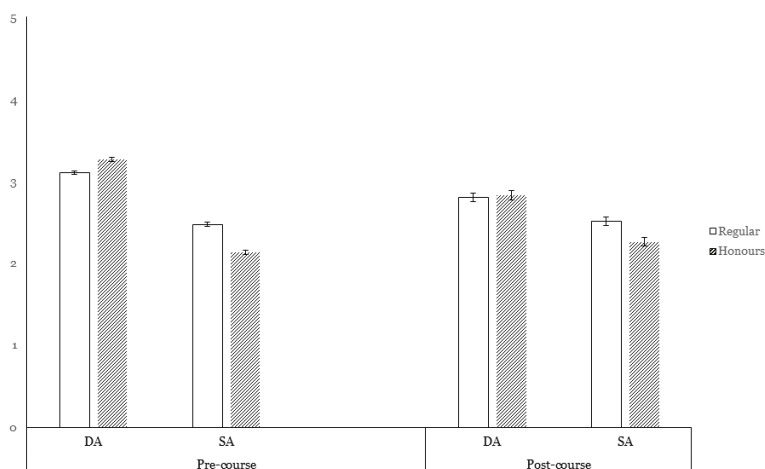


Figure 1: Learning approaches of first-year law students, pre- and post-course. The learning approaches were measured using the R-SPQ-2F questionnaire. DA is a deep approach to learning, SA a surface approach. Regular and honours students are distinguished (Pre-course:  $n=412$  regular,  $n=114$  honours, post-course:  $n=351$  regular,  $n=101$  honours students). Bars represent standard error of the mean (SEM).



Based on the pre-course resp. post-course surveys, high scores on the one approach are moderately negatively correlated with low scores on the other approach. The post-course surveys show a decrease in the deep approach, and that the surface approach margins remain approximately equal. Interestingly, figure 1 shows that the approaches of honours (1) and regular students (0) do not differ significantly. A numerical summary of the strength and direction of the relationship between two variables has been calculated by means of the Pearson correlation coefficient ( $r$ )<sup>29</sup>. As to the (statistically) significant correlation<sup>30</sup>, a medium positive correlation exists between the deep approaches of students at the pre- and post-course measurement moments (0.464), while a large positive correlation existed between the surface approaches (0.597), a positive relationship corresponds to an increasing relationship between the two variables. This shows that the deep and surface approaches are rather steady. Furthermore, a medium negative correlation existed between the pre-course deep approach and the pre-course surface approach (0.381), and also between the post-course deep and surface approaches (0.354), but showing a wide range of possibilities – a negative relationship corresponds to a decreasing relationship between the two variables<sup>31</sup>.

### 5.3. *Differences in groups and the role of the teacher*

A significant change occurred between pre- and post-course scores in the deep approach. It is remarkable that when comparing individual teachers, some of their students showed a considerable decline in their deep approach, while the students of other teachers showed a limited decline in their deep approach. When looking at the decrease in students' deep learning approaches, it was apparent that there was a significant difference between the decrease in the deep approaches of students during the course who were taught by some lecturers, compared to other lecturers (DA21; 0.003) and not with regard to

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29 1 is a perfect correlation, 0 is no correlation at all. The sign in front of the number (- or +) indicates whether there is a negative correlation (if one variable increases, the other decreases) or a positive correlation (if one variable goes up, so does the other).

30 Significant means that it is very unlikely that the result occurred, given the zero hypothesis, i.e. the position that there is no relationship between two measured phenomena. At a  $p$ -value of less than 0.05 the relationship between the two variables is statistically significant (and not caused by pure chance).

31 The number of pre-course surveys returned was 358 and the number of post-course surveys was 464. The correlations were significant at the 0.01 level (2-tailed).

the surface approach of students. An analysis of the variance (ANOVA) shows, however, that there is an enormous distribution of approaches within groups.

#### 5.4. *Predictors of deep learning approaches*

How do the teacher approaches (*information transmission teacher-focused* or *conceptual change student-focused*) relate to their deep/surface approaches? The approach of a student at the end of the course is the result of the pre-course level of deep learning and the influence of the teacher ( $DA2 = c + \beta_1 \times DA1 + \beta_2 \times CCFA + \beta_3 \times ITTFA$ )<sup>32</sup>. A regression analysis showed that this regression model is statistically significant, meaning that the result will not be caused by chance, to explain the deep approach at the end of the course (DA2). After having calculated the post-course level of the deep approach ( $DA2 = 1.13 + (0.495 \times 1DA) + (0.038 \times CCSF) - (0.012 \times ITTF)$ )<sup>33</sup>, it appeared that the pre-course level of the deep approach was very dominating.

#### 5.5. *Predictors of exam results*

No statistically relevant correlation – *i.e.* a mutual relationship – could be established between the exam results and the level of students' deep learning at the end of the course. Nevertheless, there was a significant correlation ( $p < 0.01$ ) between the level of surface approach learning at the end of the course and the exam results (with the total exam results being: -0.57 resp., only with the (deep learning) question about the historical context<sup>34</sup>: -0.173): a higher mark on the scale of surface learning was accompanied by a lower exam result. There was also a negative correlation between the surface approach at the end of the course and the exam result ( $p < 0.01$ ) – even a stronger correlation than with the question about the historical context – and a positive correlation between the deep approach at the end of the course and the exam results ( $p < 0.05$ )<sup>35</sup>. Furthermore, data showed a positive correlation between the *conceptual change student-focused* (CCFA) of the teacher and

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32 C is the constant,  $\beta_1$ ,  $\beta_2$  and  $\beta_3$  are the regression coefficients.

33 The influences/coefficients of CCSF and ITTF did not appear to be significant.

34 The average mark for question 4 was higher for honours than for regular students (4.68 resp. 3.92).

35 A little negative correlation is present between self-regulated learning and the exam results, statistically significant with regard to the exam total.

the exam results (0.098; with regard to question 4: 0.097, for both  $p < 0.05$  applied).

An important finding is that *approx.* 10% of the variance in the exam mark can be explained by the deep/surface approach and self-regulated learning. A deep approach at the start of the course is of significant importance, with a positive effect, while self-regulated learning has a negative effect, albeit statistically only marginal. The pre-course level of the surface approach has a significant relation with a negative effect. With regard to the exam results, the deep approach has a positive effect and the surface approach a negative effect ( $EF = 7.26 (c) + 0.4DA - 0.67SA$ ), furthermore the effect of the surface approach on the exam result is stronger than differences in the deep approach. However, only 8.2% of the exam results can be explained by differences between the deep and surface approach. When including the influence of teaching approaches, it only explains 8.9% (but only formally and statistically this is not significant). If teachers used more of an *information transmission teacher-focused* approach, the exam marks decrease; if they instead used more a *conceptual change student-focused* approach, the exam marks increase. This tendency is what is hoped for. If only teaching approaches are considered, this variable only explains 1.8% of the variance<sup>36</sup>.

### 5.6. Results: concluding remarks

In conclusion it may be said that, based on the Post-hoc tests in the one-way ANOVA, there are differences among teachers but these differences do not have a significant effect, based on the range of data. The regression analysis shows a large variance between the (27) groups of students. Furthermore, the effect of teachers' approaches on students' approaches is not significant, as deep approach at the starting moment is dominant. The effects of teachers' approaches on the development of an interest in studying are more substantial, but not significant – they explain only 1% of the changes.

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<sup>36</sup> When applying the method as described by STES, DE MAEYER, VAN PETEGEM (2008), 6% of the variance can be explained. From the regression analysis, it appears that statistically significant and a dominant factor is the element 'Studying is Interesting', which explains almost 39% of the exam results. A positive correlation exists between 'Studying is interesting' and the exam results. A higher level of *conceptual change student-focused* is correlated with higher exam marks (somewhat more significant). If one only focusses on student approaches, the construct 'learning by heart' is also significant: a negative correlation existed: a higher level of "learning by heart" was correlated with a lower grade.

## 6. Discussion and conclusion

The purpose of this study was to measure the effect of a (new) course design and teaching approaches on the learning approaches and learning outcomes of first-year law students. With regard to the educational design, on average students thought – compared with the two previous courses in the first year of the Law curriculum – that it helped slightly better in gaining an insight into the working of law in context. Nevertheless, a significant decrease in the deep approach occurred when comparing post- with pre-course scores. When looking at the role of the teacher, it has been shown that the effect of teachers' approaches on students' approaches was not significant, as a deep approach at the starting point was dominant.

According to the literature, a perceived environment which encourages a deep approach to learning is associated with high-quality teaching. For that a (perceived) academic environment with some independence in choosing what is to be learned, as well as a clear awareness of goals and standards, is required<sup>37</sup>. From a previous study in Hong Kong it became clear that students, when becoming older, are less likely adopt a surface approach and are more likely adopt a deep approach. Furthermore, from that study a decrease in the use of the deep approach through a course of study in tertiary education was determined<sup>38</sup>. A decrease in deep approaches also occurred during the *Introduction to Private Law* course<sup>39</sup>. It is possible, with remarkable ease however, to teach in a way that encourages surface approaches, but encouraging deep learning approaches is much more difficult – its effects were not significant in our study – and seems to require more than one course period to accomplish it. Still, it is important to keep striving for such an approach, and deep learning deserves a greater emphasis rather than simply discouraging surface approaches, not only for the effect on exam results but also in general in order to improve the quality of learning outcomes and to increase the conceptual thinking skills of students. The preference for the deep over the surface approach for the exam results can also be concluded from our study<sup>40</sup>.

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37 TRIGWELL, PROSSER (1991).

38 GOW, KEMBER (1990).

39 If the deep approach started high (honours students), the deep approach decreased at the end of the course: but this is undoubtedly due to the high level that they started with and the fact that they can no longer really increase.

40 Although it only explained a minor part of the exam grades.

A general preference for surface and passive learning is present in large numbers among law students. This approach is fostered by the volume of cases, rules, procedures and legislation that dominate law and may be reinforced by the traditional method of teaching law by lectures<sup>41</sup>. These findings should be, or at least remain of concern to law educators. Although educational literature stresses the importance of teaching methods, and the role of the teacher in students' approaches, and despite the creation of a context that should facilitate deep learning, practice shows that a number of students persist in taking a surface approach<sup>42</sup>.

What is the relation between the approach of the teacher and students' approaches to learning? According to (the quantitative study by) Trigwell *et al*, there are two ways of teaching: one that focuses on transmitting knowledge and one that focuses on students and on achieving a change in their conceptions. The first way of teaching is more likely to lead to a surface approach; the second way of teaching is more likely to lead to a deep approach. Although the second link is less strong, it is interesting and important as various studies show that deep approaches, where adopted, lead to higher learning quality<sup>43</sup>. In conclusion, teacher-focused transmission teaching should be discouraged and conceptual change student-focused approaches should be encouraged. Student-centred/focused learning provides students with a learning process by self-discovery, under the supervision of a teacher<sup>44</sup>. Our study, which does not refer to physical science as in Trigwell's study, but to law, includes teachers' perceptions of their approach instead of students' perceptions of their teaching (as in regular evaluations) and examines the relation of these approaches to students' approaches to learning.

From our study it became clear that deep learning approaches at the end of the course were largely dictated by the initial approach to learning, not by the teachers' approach to teaching. The teacher only appeared to have some effect on students' interest in a course, and some effect was also noticeable due to self-regulated learning. These conclusions affirm Biggs' theory that it is not about what the teacher does, but is rather about what the student does and the focus should be on students' learning. In order to achieve good student learning, various components in the system need certain requirements.

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41 BARON (2002), p. 125, with references.

42 *Ibidem*.

43 TRIGWELL, PROSSER, WATERHOUSE (1999).

44 BARON (2002), p. 124.

The possibility to encourage students to adopt a deep approach by intervening in the learning context has been suggested by the approaches to learning and metacognition literature. Students' approaches to learning – they may adopt one or the other, or both, to a varying extent – are also influenced by their orientation to studying. That orientation is related to previous educational experiences. Therefore, the redesign of *curricula* and teaching materials will not be universally effective<sup>45</sup>. A supportive learning context will not necessarily be enough to encourage students who have a predisposition to adopt a surface approach to adopt a deep approach, but a predisposition to rote learning can be discouraged by ensuring that teaching activities and assessments require the demonstration of understanding, analysis and critical evaluation<sup>46</sup>. Our course design focuses on these elements. Although deep learning approaches can be stimulated by the learning environment, lower level strategies form prerequisites for higher level ones, and thus there seems to be a need for a staged progression of learning activities<sup>47</sup>. Finally, in order for students to adopt a deep approach, they need to be intrinsically as well as achievement motivated – and that also concerns the affective domain – to adopt both meaningful and organized strategies<sup>48</sup>.

From our study it can be concluded that there are various factors that influence deep approach learning, other than the role of teachers and course design, especially at the starting period/year of university study. This is in accordance with the outcome of the study by Postareff *et al.* (although it did not include law students). Postareff states that individual factors, such as time investment and regular studying efforts, the goals set, study skills and skills in regulating one's own learning, most clearly explained the changes in students' deep approach, while environmental factors, particularly students' experiences of the teaching-learning environment and their perception of the teaching quality provided, contrary to several other studies in the field of higher education, do not give a clear explanation of the changes (*i.e.* according to students' own perceptions). An exception was the way in which students experience the challenges presented by courses, more clearly related to deep-approach changes<sup>49</sup>. One of Postareff's conclusions is that learning

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45 ENGLISH, LUCKETT, MLADENOVIC (2007), p. 464.

46 *Ibidem*, p. 464.

47 *Ibidem*, pp. 464-465. See elaborately on the levels of learning, BLOOM (1956).

48 BIGGS, RIHN (1984), pp. 283 and 286.

49 POSTAREFF, PARPALA, LINDBLOM-YLÄNNE (2015).

environments should support students' self-regulated learning and provide assignments that encourage students to devote time and effort to studying.

An alternative view is provided by Barton who used the ideas of the psychoanalyst Klein. She considered student learning approaches to be far more subjective than was normally understood and far less under the control of teachers than is normally assumed. Students enter the classroom with a predisposition somewhere along the spectrum of learning approaches (instead of purely contextual and relational); attempts to force students to adopt a different learning approach are likely to meet resistance, lead to high levels of anxiety and may be largely unsuccessful. Teachers are therefore not able to control students' approaches to learning to the extent suggested by educational psychology. A cautious approach is needed, a reflection on the desires of students to learn in a certain way, or to achieve a certain outcome. Teaching should be driven by openness, reflection and conscious awareness (instead of being led by narcissistic and heroic behaviour)<sup>50</sup>.

Another, final, element to consider is the assessment. We know that law students prefer an examination-oriented approach to studies. Assessment should encourage deep (or life-long) learning. In a law school, a real danger exists, *i.e.* that poorly designed assessments, including end-of-semester unseen final examinations, encourage surface (or short-term) learning<sup>51</sup>. New ways of assessment, instead of assessments with teacher-designed hypothetical (unlikely occurring) problem-style questions, should be found, as well as authentic tasks that resemble real (professional) life.

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<sup>50</sup> BARON (2002), pp. 126, 134, 135 and 139.

<sup>51</sup> GLOFCHESKI (2011), p. 3-4.

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## Abstracts

ALICJA BAŃCZYK, *The Medieval Legal Practice of Exculpatory Oath and Trial by Fire in the Legend of Queen Isolde*

This paper is placed within the research method named “Law and Literature studies”, which in one of its genres connects the analysis of the literary texts with the legal-historical research on the events presented therein. It analyses, from the point of view of medieval law, especially of the criminal procedure, one episode from the legend of queen Isolde in which she is subject of the trial by fire. The author of this paper tries to answer the question whether the literary image of trial by fire, as presented in this legend, reflects the actual medieval legal practice. For this reason, several elements of medieval trial are analysed.

WOJCIECH BAŃCZYK, *You Can Only Write Once – The Right to Inspiration and to Transformation on the Example of the Case on James Bond Movies and Books in front of the US Courts of Appeal*

The article deals with the copyright protection of the James Bond character, which developed through more than half of the movie history and took a significant place in the modern copyright history.

At first it analyses to what extent the movie character may meet the demand of originality being the premise of the copyright protection, and to what extent it can be used without infringement claimed. Secondly, the research is conducted as to establish the ownership of the James Bond character copyright and, thus, resolve between the novel writer I. Fleming and the screenwriter K. McClory.

By means of such analyses, the article studies the usage of legal tools to interpret art, as well as the scope of admissible transformation and inspiration.

GÁBOR BATHÓ, *The Structure of the Government and the Press*

The press is said to be the fourth branch of power. That was the reason why I decided to examine the connection and relationship of the government and the press. I examine the reaction of the press to the changes in the structure of the government, the ministerial structure of the government. There is an obvious connection between the government and the press. Of course, the main content of the daily press, the daily newspapers is highly influenced by the activities of the government, the activities of the ministers, the members of the government. The connection between the structure of the government and the press is not so obvious. It is not a purely political question, a change in the structure of the government is a way of exercising the government power to shape its own organisation. Basically, it is an administrative question, governed by administrative law

and constitutional law. Perhaps it is not enough interesting for the press to deal with.

I have chosen three different topics to discuss here connected somehow to the relationship of the government and the press. The first one is the first change in the names of the Hungarian ministries in 1889; the second one is – in my opinion – the greatest change in the Hungarian ministerial structure in the power of the government to shape its own structure in 1917, and the third one is a public debate in the press about the need of given positions of ministers without portfolio.

KRZYSZTOF BOKWA, «*Oh, the Law is Ruination, and Attorneys are Vexation ...*» – *Law and Lawyers in the Opera and Operetta*

Lawyers played a vital role in European societies since the Middle Ages. Commonly known for their distinctive appearance, impenetrable knowledge and a way of life, spent amid books and papers, law practitioners were ideal to be depicted on the scenes of theatres, especially in ironic or grotesque roles. Creation and bloom of the opera in the times of Baroque and Classicism obviously introduced lawyers on the stages of musical theatres thanks to abandoning mythological and allegoric topics for more contemporary and less serious subjects (opera buffa) in the 18th century.

The paper tries therefore to show the way of seeing the law and lawyers in the culture and its evolution throughout the 18th and 19th centuries, according to various examples from the opera. That genre gives particularly wide possibilities to show an attitude and understanding of legal profession in society; not accidentally opera was sometimes perceived as a *Gesamtkunstwerk* at that time.

For chronological purposes, the first examples of lawyers in opera are derived from Mozart, who depicted them in *Così fan tutte* and especially in *Le Nozze di Figaro*, where a rather mocking version of a *iuris prudens* was immortalised as Don Bartolo, the same who played a very similar role in Rossini's *Il barbiere di Siviglia*. Also notaries did regularly play supporting roles in operas by Mozart, Rossini or Donizetti (like the supposed notary in *Don Pasquale*).

In the late 19th century, the golden age of Viennese operetta, lawyers were also seen as a graceful subject for stage depictions. Probably the best-known is a stuttering attorney Blind from J. Strauss' *Der Fledermaus*. Also in *Der Zigeunerbaron* not only a lawyer plays important role (the imperial commissar Carnero), but also various legal questions are vital for the intrigue. Some years later another imperial commissar will be present in a merely serious work, Puccini's *Madama Butterfly*, where the clash between European and Japanese understanding of marriage leads to a final tragedy.

All above mentioned examples can help the reader to understand how perceiving of law and lawyers influenced the world of musical theatre. That sets an ideal

example of a constant presence of legal matters even in a musical sphere, what shows their great role in European societies in their history.

ROMAIN BROUSSAIS, *A Legal Study of Medieval Cities from the 11th to 14th Century: the Example of Sigillography in France*

Sigillography is the study of seals and their uses. This field was particularly important in the Middle Ages, when seal authentication started to spread. The medieval renaissances in Europe gave birth to new legal entities: the self-governed cities.

First of all, during the 11th-12th century, medieval towns were granted their independence by feudal authorities: bishops, counts, local lords, kings and the Emperor. The possession of a urban seal was the proof of the self-governed aspect of the cities. Indeed, they could manage territories under their jurisdiction, the city itself and sometimes the suburbs, by enacting statutes, establishments, ordinances, bans or *keuren* (Flemish area). This urban legislation was sealed by the local power without resorting to feudal authorities, specifically without the authorisation of their local lord. The authority which granted the charter of self-government used to share the production of the law to which bourgeois were subjected to with the urban power. A couple of towns had even acquired a monopoly of rule-making in certain fields. Accordingly, the bourgeois had to use the urban seal of their own city since the local lord's sealing was no recognized by the local power anymore.

Moreover, the urban seal was used to authenticate many civil and commercial law acts enacted by bourgeois. The sealing of acts that the city did not produced itself was also an evidence of its power. In this case, the apposition of the urban seal on these contracts and acts was a proof of control over the members of urban community. On the contrary, in the South of Europe, this voluntary jurisdiction was embodied by notaries and not by the application of a seal. Indeed, the appointment of notaries by the local power was a demonstration of the independence of the city. However, southern cities sometimes used a seal for their own statutes.

Finally, the image which is carved on the seal gave indications on the degree of urban autonomy. In most cases, the presence of the lord on the seal was the sign of a strong dependence between the urban power and the local lord. Conversely, defensive walls and executive local powers represented on seals were often a symbol of self-government.

ELISABETH BRUYÈRE, *Balzac and the Criticisms of the French Civil Code in the First Half of the 19th Century*

he paper aims to address the reflections on the French Civil Code, which are to be found in the French writer Honoré de Balzac's works and were still recent at

the time. Law was omnipresent in the realistic writer's novels, especially in *La comédie humaine*. Hence it constitutes a window to the implementation of the *Code Napoleon* of 1804 in the French society, making it a relevant source for legal historiography. In fact, Balzac declared in the foreword of *La comédie humaine* that his books, describing French society between 1815 and 1848 (Restoration and Monarchy of July) competed with the vital records (État-Civil), i.e. the official register of births, weddings and deaths.

Although the still young Code was considered a masterpiece by some, especially lawyers, others believed it would lead to the destruction of traditional French society and even adversely affect the birth rate. The harmonisation that was so solicited during the *Ancien Régime* was sometimes criticised after the Revolution. Honoré de Balzac, a leading light of the French realistic literature of the 19th century, was part of this movement. For instance, the abolition of the right of primogeniture was for some, including Balzac, less than opportune as it acted like a «pestle whose perpetual game is splitting up the territory» and «will end up killing France» (*Le curé de village*).

If he had reactionary views regarding property, he was progressive in his ideas on women's rights, and above all very critical about the status given by the Code to married women and children born out of wedlock.

This article on one hand identifies the part Balzac played in the different waves of criticism of the French Civil Code in the first half of the 19th century and on the other hand shows how the writer's works can contribute to a better knowledge of how civil law was actually put into practice at the time.

DANIELA BUCCOMINO, *Between Law and Literature. Violations of Legal Rule in the Decameron*

The *Decameron* represents an increasingly complex society. Several disciplines were developing, especially medicine, philosophy, law and literature. Boccaccio, who studied law for six years as mandated by his father, was an expert in both the literary and legal fields. The *Decameron* provides exceptional evidence of his knowledge of the law as well as his legal practice. This article aims to explore the opposition of natural law and positive law as it emerges in the plot of the *Decameron* and in the short stories of Martellino (II, 1) and of Madonna Filippa (VI, 7).

VALENTINA CVETKOVIĆ-DORDEVIĆ, *Cicero's Thinking on the Essence of Legal Reasoning*

The peak of the development of the Roman jurisprudence was achieved in the 2nd and 3rd century which, since the time of Irnerius has been called the Classical period of Roman jurisprudence. Treating the law casuistically classical Roman

jurists avoided to develop a system based on notions and definitions. Different opinion was previously expressed by Cicero who emphasized dialectical nature of legal reasoning. Therefore it is not surprising that Cicero, when evaluating the work of Quintus Mucius Scaevola and Servius Sulpicius Rufus, gives priority to the latter because he mastered dialectic. Cicero's thought about the dialectical method of legal reasoning was influenced by Aristotle who was the founder of the dialectical syllogism, a method of reasoning from commonly held opinions. Cicero noticed that in organizing, presenting, and analyzing legal material there was considerable room for improvement. He thought that the method of dialectical reasoning could help jurisprudence to argue reflectively, in a systematic and abstract way. Therefore Cicero's book of *Topica* could be understood as a proposal for a reform of legal thinking of his time.

VIRGINIA MARIA DE CAPITANI, *Milan's Courthouse: a View of the Roman Legal Culture across Fascist Ideology*

This essay considers the fortunes of classicism, the so-called "*romanità*" and the myth of Rome over time. The revival of Roman history and Roman law was favoured by the possibility to 'pulled out', as a mineral deposit, values and principles, whose vocation has determined a characterization in terms of universality. Fascism movement used Roman law and the "*romanità*" to establish its propaganda. The regime needed universal and abstract principles to legitimate its policy. It also needed something evocative for masses and something able to create a strong national unit. The myth of Rome and its ancient tradition were perfect tools. The image of Mussolini "*picconatore*" is suggestive in this regard: it symbolizes the work of appropriation of the "Roman precious stones" made by *Dux* himself and by the fascist regime. Classicism revival was favoured also by archaeology and its relationship with architecture and city planning. Milan's courthouse building is an example in which Roman ideals and Roman law were physically restored and used for fascist message. The palace was made by Piacentini between 1931 and 1939. The project was inspired by the so-called mural art whose main philosophy was social function of art. The building was thought not only as a courthouse, but also as a sort of gallery of arts. Piacentini identified four iconographic areas: the Bible, the Allegorical, the classical Roman and the Regime's one. Among them different artists chose their own theme thereby playing a unique decorative cycle crossing the entire building, inside and outside its walls. The essay focuses on the artworks representative of Roman justice and underlines continuity with fascist view of law. In particular the essay describes Carrà's artworks.

CARLO DE CRISTOFARO, *History of Rome, History of Roman Law and Cinema*

In this essay we examine the relationship between cinema and ancient Rome. What standards are taken into account when it comes to cinematic adaptation of Rome? What is the role of academic consultants and universities in the Hollywood industry? Is it possible to solve the contrast between the film adaptation and the historical fidelity? These are the questions we try to answer, showing the complex relationship between the filmmakers' right to 'reboot Rome' and the preservation of the fidelity to our historical heritage.

ATHANASIOS DELIOS, *The Frogs by Aristophanes: When Comedy Meets Legal History*

The relationship between Athenian drama and law is a topic which always raised the legal scholars' attention. Almost all forms of Athenian drama include some legal aspects and judiciary citations, while the audience of comedies, tragedies and satyr plays were Athenians who were fully aware of law (by taking part in the court of Heliiaia as jurors and as active citizens in the Assembly). The ancient Greek playwright and 'Father of Comedy', Aristophanes, wrote the comedy *The Frogs* in 405 b.C, when the city of Athens faced difficult political and military conditions. Besides the political core of this play, there are also flourishing legal citations and references, which act as indirect sources of the Athenian law. This paper discusses the critical background and the plot of *The Frogs*, emphasizing on several examples of legal citations and allusions to law in order to reinforce the belief that the judicial dimension can also be found in non-legal sources of the antiquity. *The Frogs* by Aristophanes is the field where history, law and politics are perfectly combined.

PAWEŁ DZIWIŃSKI, *Interpreting the Antiheretical Edict of Wieluń. Between Literal Meaning and Philosophical Approach*

The Edict of Wieluń established by the king of Poland Władysław Jagiello to suppress emerging threat of Hussite heresy was also demanded by a dire international situation which required extraordinary measures to fend off slanders made by Teutonic Order that Poland was sympathetic to the Bohemian sectarians. For this reason, historians disputed continuously how much the law was needed only to met expectations of the Pope and the Emperor or meant a first real action against infidels in Polish history. The article aims to examine the main body of the edict in a way which ultimately settles opinions about its efficiency. It will be achieved by reading the law with the assistance of particular canon law statutes from the province of Gniezno as well as the concept of just war made that time by most elated professors of the University of Cracow. The results could lead us to the assumption that Polish-Lithuanian tradition to guarantee the freedom of beliefs from sixteenth century has its seeds sown earlier than it was reasoned before.



ALESSIA FARANO, *Law and Humanities in Giambattista Vico's Thought. A First Understanding*

This paper aims at highlighting the connection between the *Law and Humanities* approach and the philosophy of Giambattista Vico. In his 1708 oration *De nostri temporis studiorum ratione* Vico took up in a very peculiar way the *Querelle des anciens et des modernes*, focusing on the study method, especially the legal study method. According to Vico, the modern *ars critica* leaves completely unattained the realm of human actions, that cannot be described with the demonstrative method established by Descartes, but rather in their historical making. Since the law is obviously concerned with human actions, the Cartesian method cannot be set for legal matters, where prudence and wisdom play a crucial role in assessing the likelihood. This theoretical stance entails a precise study method in legal education, where the phantasy and memory need to be strengthened in order to build up the *sensus communis* useful to understand human actions and to evaluate them. Indeed, jurisprudence is essentially prudence, *prudencia*, having a practical dimension that today the *Law and Humanities* supporters are seeking to restore against the reductionist view of law.

PRZEMYSŁAW GAWRON, JAN JERZY SOWA, *Military Law, Justice and Discipline in the Early Modern Owlglass Literature from Central Europe*

The aim of our paper is to show how the picaresque literature from Central Europe in the final years of the 16th and in the 17th century described the institutions of military law, justice and discipline and their (in)efficiency in mitigating soldiers' misbehaviors. As our main source we made use of various usually anonymous pieces of plebeian poetry and drama from the territory of Polish-Lithuanian Commonwealth written in Polish. As a comparison we utilised the famous *Simplicius Simplicissimus* (*Der abenteuerliche Simplicissimus Teutsch*) by Hans Jakob Christoffel von Grimmelshausen. Central European Owlglass literature left its readers hardly any illusions about the state of military discipline, soldiers' behaviours towards civilians, or efficiency of precautions taken by military authorities. The most important difference between German novel and Polish-Lithuanian works concerns perceiving of soldiers' impunity. Literature from the Polish-Lithuanian Commonwealth territories pointed out such impunity among soldiers, whereas *Simplicissimus* visibly felt some respect towards military judiciary (at least to some extent).

LUKASZ GOLASZEWSKI, *Institutions and Criminal Procedure of the Magdeburg Law in Poland according to Judas' Sack by Sebastian Fabian Klonowic*

Sebastian Fabian Klonowic lived in Lublin, where he was a city court writer, mayor in 1594 and a life member of the city council in 1595. He was also a man of

letters and one of his works is *Judas' Sack that is Wrong Acquisition of Goods* that was printed first time in Cracow in 1600.

This poem which falls into a narrative poetry was written in Polish and divided into three parts. The title sack is composed of four pieces of leather which comes from four animals: wolf, fox, lynx and lion. In the first part author described people that take any goods away from the owners as wolves. But we can find in this section also perpetrators of sacrilege, slave tradesmen or public treasury robbers. The next part of the *Judas' Sack* was devoted to cheats of various kinds which are similar to foxes. In the last part Klonowic was described the lynxes. This term means people who on the surface apply the law properly but in reality use it falsely and contrary to its principles. Consequently they become similar to thieves and cheats. Author did not describe the lions because of terror that is produced by the force and violence.

In *Judas' Sack* we can find much information about the rules and practice of Magdeburg Law in 16<sup>th</sup> century Lublin. Klonowic vividly describes the course of trial from capturing a thief through hearing and tortures to execution. In the section devoted to lynxes he portrays some legal ways and means used by this sort of cheaters and depicts his vision of law and connections between law and justice. As a learned lawyer he refers not only to *Speculum Saxonum* and *Ius Municipale* but also to Roman law. Therefore his poem is also an important evidence that the Roman Law affected legal practice in the biggest cities of the Kingdom of Poland. Consequently, the article presents the institutions of penal law described by Klonowic, also in comparison to another sources (connecting with the Klonowic's private life too) and claims of the older and modern literature.

ALESSIO GUASCO, *Optimus princeps and the Triumphal Arch in Benevento*

This article concerns the Triumphal Arch which celebrates Trajan's deeds and represents one of the most important symbols of Benevento. This magnificent building evokes the source connected with the history of the *institutio alimentaria* depicted in one of the panels: we can observe Trajan during a visit to Benevento while he is distributing *alimenta* to the children of the town.

JUAN MANUEL HERNÁNDEZ VÉLEZ, *Pamphlet Literature reflecting Parliamentary Opposition at the Time of the French Fronde: the Example of the Mazarinades (1648-1649)*

Political pamphlets in 17<sup>th</sup> century French *Fronde* – known as *Mazarinades* – reflected through literature the political clash between the party supporting the Cardinal Mazarin (and the regency of Anne of Austria) and the opposite party. In the second group we can identify the 'people', *le menu peuple*, the magistrates from the Sovereign Courts, the aristocratic party, and some political figures such

as the Cardinal of Retz. The article assesses the first years of the *Fronde*, known as the *Fronde parlementaire* (1648-1649), and the *Mazarinades* related to the political and legal claims defended by the Parisian Sovereign Courts. These pamphlets not only supported parliamentary thesis such as the participation in financial and taxation matters but also tried sometimes to propose the Parliament of Paris as a representative organ of the people in the monarchy. Using some examples of this literature, two arguments will be stressed: 1. The *Mazarinades* echoed a legal argument used by the Sovereign Courts, the respect of legal procedures as a guarantee of justice; 2. Following the last argument, but in a bolder manner than the magistrates, some *Mazarinades* proposed the institutional intervention of the Parliament of Paris (as well as the other Sovereign Courts in their matters) against arbitrary power exercised by the regency.

RAFAL KACZMARCZYK, *Secularism versus Religion-based Legal Pluralism: The Diverse Views on These Concepts in Modern Muslim Discourse and Culture between 19th and 21st Century*

Traditionally, Muslim countries in the past were basing their legal systems on the principle of religion-based legal pluralism, guaranteeing its own jurisdiction for each legally recognized denomination, especially in the field of personal law. However, some modern socio-political concepts penetrated the Muslim cultural area. The most important of them were nationalism, secularism and socialism. All those concepts more or less opted for reduction of the role of the religion in law and state what finally happened in certain Muslim countries in the 20th century. But the idea of legal pluralism had not passed away and has its own strongholds, having its revival in the late 20th century. The paper discusses views on secularism and religion-based legal pluralism in the modern Muslim discourse and culture between 19th and 21st centuries.

The important thing is that the real solutions had its sources and motivations in the culture and contemporary discourse. Secularism and other non-religious doctrines have already been discussed and presented in the politically engaged literature of the 19th and early 20th century. The paper presents examples of such literature and points out the most influential authors and thinkers of that period. Beside the literature directly concerning the political issues, there were many examples of the popular literature (both poetry and prose) in the 19th and 20th century that had discussed the secular or religiously plural and already existing social and legal facilities. Also other kinds of art consider the issues of secularism and religion-based legal pluralism. Television and cinema are the best exemplifications of such an interest within the Muslim cultural circle. They are also an illustration of which choice had been made in the certain society.

The paper discusses the subject across the board, being just a first step to further

research in this area. It shall be an inspiration for a wider group of researchers to explore the connections between law and humanities within the Muslim civilization.

ANDREJA KATANČEVIĆ, *Legal Organization of Medieval Serbian Mining Communities*

The beginning of medieval Serbian mining is connected with the settlement of the Saxons in Serbian territories. The Saxons in Serbia are mentioned in the sources for the first time in a Charter of King Stefan Uros I (1246-1276) in the middle of 13th century. According to the majority of Serbian scholars, Saxons, at the time of their settlement, gained a written charter or charters granting privileges. Allegedly, one of those was the right to self-government. The Saxons founded communities which had some legal organization. Legal authorities are testified in five Serbian medieval mining towns. These are Brskovo, Rudnik, Trepča, Srebrnica and Novo Brdo. The available sources are mostly official records preserved in the Dubrovnik archive, some Serbian notarial documents and a charter issued to Novo Brdo at the beginning of the 15th century. This paper analyses only the legal authorities of this towns.

The results indicate that the structure of authorities of medieval mining communities in Serbia was not unified in all municipalities and that it changed over time. It speaks of legal particularity and spontaneous customary law development rather than a unique written charter giving a privilege to the self-government to the certain group which founded those communities.

The legal organization was also under different legal influences. There was the institution of *kefalije*, taken from Byzantine Empire, the *purgari*, picked up from the Saxon customary law, the institution of *knez* and *sabor*, transplanted from Serbian customary law and the newly established institution of *vojvoda*. However, the Saxon influence in the mining communities in the Serbian state was later and smaller than expected. There was no testified Saxon influence outside of Novo Brdo and Srebrnica and even there, more than century after the first Saxon settlement. Even Srebrnica was founded and legally constituted outside of the state and then taken over keeping its Saxon customary legal authorities.

IMRE KEPESSY, *The Case of Eszter Solymosi from Tiszaeszlár: the Notorious Blood Libel Trial through the Eyes of Gyula Krúdy*

Gyula Krúdy, journalist, writer, one of the most iconic authors in Hungary in the early 20th century described the supposed victim of the blood libel case that went on trial in Hungary between 1882-1883, with those words. He chose the theme of this notorious case for one of his last books before his death, mostly, because he heard many things about the trial in his parents' house in his childhood. His

father was a lawyer at the time and used those memories besides the available documents to reconstruct the events.

The case itself was a mystery. The victim disappeared without a trace and one of the last persons who saw her was the synagogue sexton who asked her to remove some candlesticks (an act forbidden to Jews on Saturdays). Soon the people started whispering about a sacrificial ritual, and supposedly someone told the sexton's five-year-old son to tell the investigating judge that he had witnessed the girl's murder. The sexton's older son became the state's 'star witness', who was detained by one of the commissars. Shortly after, he confessed to seeing three people having murdered the victim which led to numerous accusations and gave way to the trial which became decades later just as notorious as the Dreyfus Case. Fifty years later, Károly Eötvös, one of the defenders of the accused, published his notes about the case, in which he tried to defend the state actions in the process. Krúdy in his work did not only describe the trial but he also gave context to it when he wrote about the contemporary society, the people's beliefs and their relationship to the Jewish minority. At the beginning of the 1930s, he used this trial as an example and warning to show that our rights and liberties cannot be taken for granted.

NINA KRŠLJANIN, FILIP MILINKOVIĆ, *The Boyars, the Poet and the Composer. The Portrayal of the Boyar Duma in Puškin's and Mussorgsky's Boris Godunov*

The Boyar Duma was the political assembly of medieval Russia, first the Grand Principality of Moscow and later the Tsardom of Russia. Its main competences were legislation, foreign relations, but also administration and judiciary, which it shared with the Tsar himself. Its roots reaching to the early Middle Ages, the Duma drew its strength from customary law and centuries-old tradition. Even powerful and willful monarchs such as Ivan IV the Terrible (1533-1584) could not fully suppress its power and that power only grew during the reigns of weaker rulers or interregnums. One such period was, beyond any doubt, the Time of Troubles and the reign of Boris Godunov (1598-1605).

This important period of Russian history was the subject of the famous tragedy *Boris Godunov*, penned by one of the greatest Russian poets, Alexander Puškin, in 1825. The drama was later adapted into an opera by Modest Mussorgsky in 1869/1872. Both works of art feature important scenes of the Boyar Duma at work; both are artistically impressive, but how true are they to the legal reality of Godunov's time?

The aim of this paper is to analyse the portrayal of the Duma in the drama and the opera *Boris Godunov*. The authors will focus not only on the accuracy (or lack thereof) of the factual depiction of the assembly, but also on the impressions that the artists had and wished to transmit to their audiences. What dramatic forms

of narration and figures of speech, what forms of musical expression were used during the scenes that portrayed the Duma's work? How did the great artists of the 19th century perceive a legal institution that had played a great role in the history of their country over the distance of two and a half centuries?

MARCIN ŁYSKO, *The Structure of the Government and the Press*

In December 1951, the reform of Polish system of adjudicating on petty offences introduced the administrative model of resolving the misdemeanour cases involving the social factor. Fully dependent from the Ministry of Home Affairs adjudicating boards penalised transgressions of order, but were also used for the repression of political opponents of communist authorities. The practice of adjudicating prison sentences and high pecuniary penalties exchanged for detention was characteristic of the operation of the adjudicating boards in the capacity of an instrument for combating political opposition until the end of the People's Republic of Poland.

FABRICIO MULET MARTÍNEZ, *History and Legal History in Latin America. Reflections on a Necessary Dialogue with Special Attention to Cuban Experience*

Legal History, as a historical discipline, despite of the divergences in regard with its epistemological status, has been necessarily influenced by the methods and concepts of the science of History. However, the relationship between both matters has not been close enough over time, particularly in Latin American continent, where normativist approach has prevailed in the legal academic discourse. The present article will address the development of History and Legal History as academic disciplines in Latin America, paying special attention to the Cuban case, since the beginning of twentieth century to present days.

PAOLA PASQUINO, *Scientia iuris and architectura. A Focus on Buildings for Shows*

In the Vitruvian essay it is possible to read one of the most well-known theories about the relationship between *scientia iuris* and *architectura*: while listing the sciences that 'adorn' (lat: *ornare*) an architect's education, Vitruvius also mentions (1.1.3) the *responsa iuris consultorum*. An architect, indeed, should take into due account all of the *lato sensu* normative provisions relating to new constructions. Among these, the paper focuses on the directives regarding the construction of buildings for shows, to which (in particular, to theatre) the theorist of *architectura* dedicates wide attention in the fifth book of his work.

If the public housing was an efficient stratagem for the political career, the construction of suitable buildings for *ludi*, *agones*, *venationes* and *munera* had a particular significance, due to the unrestrained passion of ancient Romans for this kind of performance. The shows, with a strong political connotation, became

a mean of political propaganda and then an instrument for absolutism; and the way of constructing buildings for shows reflected the relationship between the 'ruling class' and the citizens.

With regard to these buildings, considered as *res publicae in publico usu*, it is possible to find in the sources – both in the literary and in the legal ones, in the context of the rules relating to construction and conservation of public works – some specific provisions: looking at them and (in a symmetrical perspective of the survey) at these places location and their structural characteristics, it is possible to understand what the policies behind these mass buildings were, and also the needs to which the 'central government' gave importance in order to satisfy public interests.

CLAUDIA PASSARELLA, *Law, Justice and Architecture in Modern Venice: the Rectors' Palaces and the Government of the Mainland*

After the territorial expansion which took place beginning in the late middle ages, Venice became the capital of an extensive area: therefore the central government decided to send its representatives, called "Rectors", to the centres of the mainland. In order to host the Rectors, important architectural interventions were carried out: many public buildings were totally or partially renovated, while others were built *ex novo*. Thus the Venetian conquest had significant consequences not only in the juridical dimension, but also on urban planning. My research focuses on this connection with the aim of examining the relationship between law, justice and architecture on the Venetian mainland in the modern age.

NICOLAS PICARD, *Newspapers and the Making of Popular Legal Culture. The Example of the Death Penalty in France (20th century)*

Cultural and social historians are trained to consider the popular press as a material source for their researches, but legal historians seem to find this medium more difficult to handle. Journalistic accounts are often viewed as inaccurate, emotional, 'un-scientific' and therefore far away from the technical and rational characteristics of the legal texts. Even with the opening of the judicial sciences to the literary studies, these narratives have suffered from lacking legitimacy in comparison with more classical genres such as novels or essays. Nevertheless, literary studies have shown the similarity of press articles with literature through the character of the writer-reporter. They also have exposed the possibility to study them as literary documents. This approach could inspire the juridical sciences. If there is some legitimacy to not take the journalistic accounts for an established truth, there is no reason to exclude them: it's a way to consider which legal culture is shared by the common people

This paper aims at suggesting that popular press articles could be read as 'law-pro-



ducing' as well as 'law-produced' documents. The example of the death penalty in France shows that newspapers influenced the passing of new bills penalizing new crimes. Press judicial reports offered a view on the functioning and practice of law. They allowed the reader-citizen to set up a popularized legal culture and this representation being the main one in the society. They could propose an explanation for the presidential 'jurisprudence' regarding pardons, whereas doctrine usually neglects to take into account these 'political' decisions. They are part of the few documents available to grasp the official rules in use in prisons and in the death row.

PIOTR POMIANOWSKI, *The National Codification of Civil Law in Poland at the Beginning of the 19th Century. Sources and Inspirations*

In the so-called Congress Kingdom of Poland the idea of creating the national codification of private law appeared and remained popular. It was desired to create a system of law that would support building and strengthening the national identity. The way to achieve it was possible through appreciation of whole normative elements of national legal tradition, like: specific institutions, procedures, legal terms and symbols. However non-normative factors were also important, such as: specificity of court judgements, the manner of how law functions among the society and the character of science of law. It is worth-mentioning that the idea of creating the national codification could at that time and still can also mean creative reception of foreign law which may be useful in local conditions. In this situation, not only the selection of foreign sources of law, but also the manner of application and interpretation of these sources were significant. There were many sources of foreign law which could have been taken into consideration in the process of preparing the national codification as the Polish lands at the turn of 18<sup>th</sup> and 19<sup>th</sup> century were a kind of experimental field to many legal systems (Austro-Galician, Austrian, Prussian, and French).

The works on the national codification were taking place between 1815 and 1830. There were two especially important statutes. In 1818 provisions of the *Code Civile* according mortgage (*hypotheca*) were replaced with the new parliament act. Secondly, in 1825, the first book of the national code was adopted (personal and family law). The aim of this paper is to present the sources of the second act. It is well known that Polish lawmakers used French, Austrian and Prussian solutions. However some originally Polish institutions were restored, too. Statistical methods were used to estimate the scale of borrowings from each foreign system.

CHRISTINA REIMANN, *Advertising and the Rule of Law. Law in Representations of Insurance in Late 19th Century Netherlands*

Since the late 19th century, insuring one's life and health has been an important facet of modern life for both individuals and socio-political communities all over



Western Europe. This paper argues that in the Netherlands the expansion of life-, health- and invalidity insurance was not only part of the juridification of society in the late 19th century, but that the insurance democratisation was facilitated by the cultural transmission to and dissemination of law amongst the (lower) middle-classes. This text examines media representations of insurance law, specifically advertisements, to understand how the law extended to and became part of ordering daily life for individuals in the Netherlands. The paper also demonstrates how insurance practices, and more particularly their legal foundations, helped to shape visual and material culture at a time when the Netherlands were stepping into the age of mass production and consumption.

RIBERI MARIO, *The Dreyfus Affair in Music. L'Hymne à la Justice of Albéric Magnard*

The paper wants to present a peculiar case of orchestral work composed by Albéric Magnard and inspired from a famous public affair.

Albéric Magnard (1865-1914) was a singular figure within the French music world. He began his musical studies at the Paris Conservatory but he grew disillusioned and decided to leave. He became a pupil of the French composer and teacher Vincent d'Indy (27th March 1851-2nd December 1931) and with him he studied composition. The two shared many ideas concerning musical form and aesthetics. Fundamentally, a Romantic, like d'Indy, he approached music as a representation of the inner life, but being an idealist, he sought perfect order, as sustained by beauty and justice. Music, for Magnard, was an art of thought.

When the *Affair Dreyfus* broke out, Magnard could not stand aside from the tumult and he declared himself a 'dreyfusard'. He became deeply absorbed in the fundamental issues surrounding the *Affair*, resigning his commission as an officer because his beliefs concerning them were so strong. In 1903 Magnard presented his *Hymn à la Justice* inspired by the *Affair Dreyfus*.

BALÁZS RIGÓ, *The Methods for the Legitimation of the Succession of James II in Aphra Behn's Poem for Coronation*

The paper examines a pindaric poem written by one of the first English woman poet, Aphra Behn, dedicated to the coronation of James II. After that, the work confronts it with the corresponding political events and theories. From this examination, it can be concluded that the poem has an intention other than to glitter the people and the monarch. Moreover, it turns out that the coronation poem does fulfil the other purpose i.e. the legitimation of the monarch. This legitimation is carried out by the metaphors of the poem, because either the structure, the rhymes, or the pictures and the narrative are to broadcast the inner layer of understanding and interpretation of the poem. These metaphors and allegories

are so multi-ambiguous that because of the pindaric word order the subject and the object can be transposed and we can never be sure how to read it. This was the method by which the meaning and the purpose was stressed. Thus, Aphra Behn's pindaric poem upon the coronation of James II, after the relevant aesthetic approach, uncovers us the religious, absolute, warrior and even the patriarchal conception of James II that has been traced and revealed through the metaphors. Examining the poem, the above mentioned aesthetic and historical features of religion, power, wars, should be amended by the psychological methods for the legitimation of James II which are more serious than the visible declaration of powers in the poem. As the author uncovers it, the poem was full with emotions that had the same purpose that the religious, historical and political legitimation. These emotions are to validate and ratify the significance of the coronation and are to make emotional bonds with the monarch so that none rebelled against him as the father or better to describe the patriarch of the nation.

FRANCESCO ROTONDO, *Reading a Travel Journal. The Melancholia of Gina Lombroso in Latin America*

The paper analyses Gina Lombroso's observations of the development of criminal anthropology in South America. In her travel journal, published in 1908, she focuses mainly on the Argentinian penitentiary institutions and mental hospitals and deems the establishment of these institutions as tangible signs of the rise of her father's beliefs.

In particular, the premises and internal structures for the convict and dangerous alienated people are equipped and managed according to the ideas of Italian criminal anthropology's followers.

However, as explained by the author, the huge spread of criminology in Argentina did not ultimately result in a change of substance of the national criminal law and criminal procedure

HESI SIIMETS-GROSS, *A Letter from Detention: The Edition of Letters of Livonian Humanistic Lawyer David Hilchen as an Interdisciplinary Challenge*

David Hilchen (1561-1610) was a *syndicus* of Riga, acknowledged as the central Humanist of Livonia and a key figure in terms of legal, linguistic, literary and educational influence. He has left an unpublished and unexplored Latin correspondence (ca. 800 letters), the object of a research and editing project. David Hilchen was a lawyer in the service of the city of Riga, the estates and the Polish king as well as the notary of the main Catholic bishop in the Protestant territory. He was later accused of high treason and sentenced to death. His letters offer a glimpse into the life of a talented and influential politician and Humanist who tries to defend himself from the attacks of his adversaries. The article focuses on

the correspondence regarding his court proceedings, provides some insight into the letter-writing tradition in the Humanist period and analyses the personal motives of David Hilchen, his objectives and dilemmas.

FABIANA TUCCILLO, *Typographic Art and Roman Law: A Renaissance Image of the Lex XII tabularum*

Starting from the title-page of Odofredus's *Lecturae super Digesto novo*, printed in Lyon in 1552, I proceed with an exercise of access to the text through the so-called 'thresholds' – as defined by Genette (1987). In this paper I analyse how historical and legal elements have been recounted through an image of a title page. The illustration on the title-page of Odofredus's *Lecturae super Digesto novo* seems to recall the *leges XII tabularum*. This image has a connotative value, i.e. it aims to push the reader inside the book, thus creating a link between the text and the editorial paratext.

EMANUEL G. D. VAN DONGEN, IRMA MELJERMAN, *Teaching a Historical Context in a First-Year 'Introduction to Private Law' Course. The Effects of Teaching Approaches and a Learning Environment on Students' Learning*

Law students in the Netherlands tend to focus on the current state of the law. Students focus on what they believe will later be legal practice, and this often leads to a surface approach to legal matters among students, especially with regard to legal history. The question arises how this surface approach can be turned into a deep approach to learning and, in that respect, what influence teaching has on the level of students' learning. In this study we investigated whether a new teaching approach as to the historical context of law will stimulate deep learning. This study concentrates on an intervention in the teaching materials and the teaching methods of a first-year course in law, *Introduction to Private Law: Law of Obligations* (ca. 700 students), where an integral approach to skills, (legal) content and historical context (legal history and Roman law) was offered. The effects of this intervention on students' learning were studied by means of questionnaires. The results of the student survey (at the beginning and at the end of the course) were compared and related to the approaches taken by teachers, and compared to the exam results and in particular the questions on the historical context. With regard to the educational design, on average students thought – compared with the two previous courses in the first year of the Law curriculum – that it helped slightly better in gaining an insight into the working of law in context. Nevertheless, a significant decrease in the deep approach occurred when comparing post- with pre-course scores. When looking at the role of the teacher, it has been shown that the effect of teachers' approaches on students' approaches was not significant, as a deep approach at the starting point was dominant.

NIKOL ŽIHA, *Medicus between Perception and Reality as Portrayed in Some Non-legal Sources*

A reflection of Roman society's attitude towards the medical profession can be explored through numerous non-legal sources (e.g. Plutarch *Cato Maior* 23,3; Plinii Secundi Iunioris, *Medicina* pr 1-2; Martialis *Epigrammata* 1,47, 5,9 and 8,74; *Anthologia Graeca* 11,122), the majority of which portray a physician who misuses his position of trust and authority and acts contrary to the Hippocratic ideal. One of the most severe criticisms of doctors is expressed by Pliny the Elder in his encyclopedic work *Naturalis Historiae*, where he identifies a doctor as the only person who can deprive someone of existence without being punished (*Nat.His.* 29,18: «medicoque tantum hominem occidisse inpunitas summa est»). Pliny's stereotype of doctors, who encouraged diseases by causing fear and psychological instability of their patients in order to enrich themselves pertained and was centuries later metamorphosed in numerous literary works. The purpose of this contribution is to evaluate the quoted statements found in literary sources and to investigate whether doctors deserved the bad reputation that they were associated with. By reconstructing the legal framework and liability of the Roman *medicus*, the focus will be placed on the analysis of the available legal sources in order to clarify what is behind the label ascribed to physicians that «the doctor is worse than the disease itself» (Pl. *Medicina* 1).

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